United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANTS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOS. 18793, 18794

NATHANIEL E. SHELTON AND ROBERT B. PANNELL

Appellants

v.

UNITED STATES OF AMERICA

Appellee

872

Appeal from a judgment of the
UNITED STATES DISTRICT COURT
For the District of Columbia

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STATEMENT OF QUESTIONS PRESENTED

I

Whether the failure to afford counsel to these indigent accused until 61 days after their arrest denied them their Sixth Amendment right to effective assistance of counsel.

II

Whether denial of assistance of counsel to these appellants at preliminary hearing and at arraignment deprived them: (1) of their constitutional right to counsel; (2) of their right to counsel under the District of Columbia Code; and (3) of fundamental due process under the Fifth Amendment.

III

Whether the failure to afford counsel to indigent accused at the preliminary hearing was an invidious discrimination in violation of the equal protection of the laws guaranteed by the Constitution..

IV

Whether these appellants were denied a speedy trial when the delay in appointing counsel for them during the crucial weeks following arrest resulted in irreparable prejudice in the preparation of their defense.

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Brief for Appellants

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JURISDICTIONAL STATEMENT

Appellants appeal from a conviction in the United States District Court for the District of Columbia on the first count of a two-count indictment which charged a violation of 22 D.C. Code Section 1801, Housebreaking, in the first count. A jury found each appellant guilty of Housebreaking on January 21, 1964. On March 6, 1964, appellants appeared before the Honorable Alexander Holtzoff and each was sentenced to seven (7) years under the Federal Youth Corrections Act, Act of Sept. 30, 1950, c. 1115, 64 Stat. 1085, U.S.C., Title 18 §5010(c).

On July 14, 1964, this Court ordered that appellants be allowed to prosecute their appeals without prepayment of costs.

The jurisdiction of this Court on appeal of these causes is founded upon the Act of June 25, 1958, c. 646, 62 Stat. 929, U.S.C., Title 28, §1291.

STATEMENT OF THE CASE

Appellants Nathaniel E. Shelton, 18 years old, and Robert B. Pannell, 20 years old, were taken into custody by two police officers after being found with two other persons on the second floor of the Quick Service Laundry Company between three and four A.M. on Sunday, September 22, 1963. They were taken to the Ninth Precinct of the Metropolitan Police Department and confined there until Monday, September 23, 1963, when they were brought before Samuel Wertleb, United States Commissioner for the District of Columbia, for preliminary examination. (Rec.).

The rubber stamp impression on the front side of the form which the Commissioner employed to report the proceedings with respect to appellants' first appearance before him states: "Complaint prepared. Defendant was informed of the complaint and of his right to have a preliminary hearing and to retain counsel. Defendant was not required to make a statement and was advised that any statement made by him may be used against him. Defendant was advised of his right to cross-examine witnesses against him and to introduce evidence in his own behalf." Following the rubber-stamped statement, the following line was typed on the report: "Each defendant requested a hearing now."

On the reverse side of the Commissioner's report is a statement relating to the preliminary hearing. Blanks on the report for entry of appearance of counsel show that neither appellant had counsel at the preliminary hearing. A witness for the Government testified before the Commissioner. Following this testimony, the Commissioner made a finding of probable cause and committed appellants to the D. C. jail. Bail was set at $2,000.00 for each appellant. Neither appellant posted bail.

The Grand Jury made a Presentment against the appellants on October 22, 1963, but it was not filed until November 18, 1963. (Rec.).

On November 8, 1963, appellant Shelton executed an Affidavit in Support of an Application for Leave to Proceed Without Prepayment of Costs, in which he requested court-appointed counsel. At the same time he executed a pro se Motion for Reduction of Bond. No action was ever taken on this request for counsel. (Rec.).

On November 18, 1963, an indictment was filed in open court, charging appellants with Housebreaking, 22 D.C. Code 1801, and with Destroying Movable Property, 22 D.C. Code 403. (Rec.).

On November 19, 1963, each appellant executed an Affidavit in Support of Application to Proceed Without

Prepayment of Costs.(Rec.). The Clerk's letter notifying counsel of their appointment was dated November 21, 1963. Although the letter of appointment informed counsel that trial was set for the week of January 6, 1964*, it failed to notify counsel as to the time set for appellants' arraignment or of the fact that appellant Shelton had filed a pro se motion for reduction of bond.

On November 22, 1963, appellants appeared before Judge McLaughlin of the United States District Court for the District of Columbia without counsel and were arraigned. They entered pleas of not guilty and appellant Shelton was heard on his pro se Motion for Reduction of Bond. Shelton's motion was denied. Appellants were again remanded to jail.

An affidavit filed January 17, 1964, by appellant Shelton's counsel in support of a Motion for Discharge of Defendant Nathaniel E. Shelton and For Dismissal of Indictment For Want of a Speedy Trial states in part:

* * * * * * * * *

> "2. That counsel have interviewed said defendant on seven occasions since this appointment and that defendant has had difficulty in recalling facts which took place at the time of the alleged crimes with which he is charged.

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* Counsel for Shelton received the letter informing him of his appointment on November 22, 1963, the day of the arraignment. (Rec.).

"3. That in the course of interviews with counsel defendant gave counsel the names of persons who were possible witnesses in his behalf; that two of these persons cannot be found; and that other persons cannot now recall the events that occurred at the time of the alleged crimes.

"4. That counsel investigated the premises and the nearby vicinity where the alleged crimes occurred and questioned persons in the area. However, because of the inability of defendant to recall the description of possible witnesses and to recall the events, and sequence of events, which occurred two months before his first interview with counsel, counsel have been substantially handicapped in their effort to determine the places visited by Shelton on the night of September 21st and the early morning of September 22nd, to locate persons who saw Shelton at that time and to reconstruct events.

"5. That counsel has had the assistance of Captain Elmer, Chief Investigator of the Legal Aid Agency, but that neither Captain Elmer nor counsel have been able to locate certain persons described by defendant Shelton by reason of inadequate description of these persons by Shelton.

"6. That in the particular circumstances of this case, the whereabouts of the defendant and his actions before and during the alleged crime are of the utmost relevance and materiality. That, for the reasons set forth above, counsel have been prejudiced in their ability to gather such facts." (Rec.).

The case was set for trial on January 15, 1964, and on that date appellants announced ready for trial. The case was not assigned to a trial court on that day or on the following day. On January 16, 1964, the case was continued to January 20, 1964. (Rec.).

The grounds set forth in appellant Shelton's pre-trial motion for discharge and for dismissal of the

indictment, denied by Chief Judge McGuire on the day of trial, were that "by reason of the lapse of 57 days between the arrest of defendant and the filing of the indictment, the attendant delay in the appointment of counsel following the arrest of defendant and the imprisonment of defendant by reason of his inability to buy a bail bond, the rights of defendant have been substantially prejudiced. The delay has materially affected the ability of defendant, an 18-year-old of limited education and with an intelligence quotient of 83, to recall for his counsel all of the facts related to the charges against him, to enable counsel to conduct the factual investigation essential to the defense of this case." (Rec.). Appellant Pannell also filed a pre-trial motion for dismissal of the indictment against him. (Rec.). This motion was also denied by Chief Judge McGuire on the day of trial.

On January 20, 120 days after their arrest, appellants' trial began; the trial concluded on January 21. The defense offered by appellant Shelton was that at the time of the alleged crime the appellant was so intoxicated that he was unable to form the specific intent to steal. (Tr. 97-103).* Appellant Pannell presented no witness on his behalf. The jury convicted the appellants of Housebreaking and found them not guilty of Destroying Movable

* Trial Transcript

Property. The Court sentenced appellants to seven years under the Federal Youth Corrections Act, Title 18 Sec. 5010(c), U.S.C. and remanded them to the District of Columbia jail. (Rec.).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

Fifth Amendment to the Constitution of the United States:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . "

Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Federal Rule of Criminal Procedure 5(b), (c):

> "(b) Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.
>
> "(c) Preliminary Examination. The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him."

Proposed Federal Rule of Criminal Procedure 5(b):

"(b) Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules."

Federal Rule of Criminal Procedure 44:

"Assignment of Counsel. If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."

Proposed Federal Rule of Criminal Procedure 44:

"(a) Right to Assigned Counsel. Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the commissioner or the court through appeal, unless he waives such appointment."

The Code of the District of Columbia, Title 2, §2202:

"§2-2202. Counsel for indigents to be provided in criminal proceedings and proceedings of a criminal nature.

"The Agency shall make attorneys available to represent indigents in criminal proceedings in the United States District Court for the District of Columbia and in preliminary hearings in felony cases, and in cases involving offenses against the

United States in which imprisonment may be for one year or more in the Municipal Court for the District of Columbia, in proceedings before the Coroner for the District of Columbia and the United States Commissioner, in proceedings before the juvenile court of the District of Columbia, and in proceedings before the Commission on Mental Health of the District of Columbia and proceedings in the courts arising therefrom.

"The Agency shall from time to time advise each of the courts and tribunals named in this section of the names of the attorneys employed by the Agency who are available to accept assignments in said court or tribunal. The judges or other presiding officers of the several courts and tribunals may assign attorneys employed by the Agency to represent indigents, such assignments to be upon a case-to-case basis, a group-of-cases basis, or a time basis, as the assigning authority may prescribe. Each such court and tribunal will make every reasonable effort to provide assignment of counsel as early in the proceeding as practicable."

STATEMENT OF POINTS

1. Appellants, both of whom were young and without funds to retain counsel, were deprived of their constitutional right to the effective assistance of counsel because they were not afforded court-appointed counsel until 61 days after their arrest. This unreasonable and unnecessary delay in the appointment of counsel not only conferred a time advantage upon the prosecution in the preparation of its case but also irreparably prejudiced appellants. Appellants' counsel were deprived of a crucial period after arrest during which the preparation of appellants' defense should have been in progress.

2. The failure of the United States Commissioner to inform appellants of their unqualified right to counsel or to provide counsel for them violated their constitutional right to effective assistance of counsel as well as the requirements of the District of Columbia Code.

3. Appellants were denied effective assistance of counsel and deprived of fundamental due process of law because they were not afforded counsel for their preliminary hearing or for their arraignment, which were both critical stages in the proceedings against them.

4. The Federal Rules of Criminal Procedure deny equal protection of the laws to appellants in violation of the due process clause of the Fifth Amendment

insofar as such rules permit counsel at the preliminary hearing for persons who can afford to retain counsel but deny counsel at the preliminary hearing to persons without funds.

5. The appellants were denied their constitutional right to a speedy trial under circumstances in which 57 days elapsed between their arrest and indictment, 61 days between arrest and arraignment and the availability of counsel, and 120 days between arrest and trial, and, by reason of the delay in the appointment of counsel, the preparation of appellants' defense was irreparably prejudiced.

SUMMARY OF ARGUMENT

I

Appellants were denied the assistance of counsel guaranteed by the Sixth Amendment. The delay of 61 days after arrest in making appointed counsel available to appellants while they were held in jail substantially prejudiced counsel's preparation of the defense to the charges against appellants.

Recent decisions of the United States Supreme Court and of this Court make it clear that the right to the assistance of counsel in a criminal case encompasses such assistance in the preparation as well as in the trial of the case. Unless the accused has the assistance and advice of counsel during the crucial weeks following arrest in order that counsel may gather evidence essential to the preparation of the defense, then the trial becomes a sham and, though it may conform to technical procedural requirements, is devoid of that fundamental fairness guaranteed to all defendants in criminal cases.

II

Appellants were not afforded the assistance of counsel at preliminary hearing and arraignment. At appellants' appearance immediately prior to preliminary hearing, the United States Commissioner failed to inform

appellants of their right to have assigned counsel, nor were assigned counsel provided for appellants at the preliminary hearing, a critical stage in the proceedings against them. Two months after the preliminary hearing, throughout which time they had been imprisoned, appellants were arraigned in District Court, another critical stage in the proceedings against them. In the absence of counsel and without having had the opportunity to consult with counsel, both appellants entered pleas of not guilty. The pro se motion of appellant Shelton for reduction of bond was denied.

The earlier view that an accused is not prejudiced when without being afforded counsel he appears for his preliminary hearing or arraignment and enters a plea of not guilty is no longer the law. In federal jurisdictions, each of these proceedings is a critical stage of the proceedings against the accused. As a matter of constitutional right, if the accused is indigent, he is entitled to assigned counsel at these proceedings.

In the District of Columbia the Commissioner is required to appoint counsel for appellant before holding preliminary examination.

In the circumstances of this case, on Sixth Amendment and statutory grounds as well as under the local

supervisory power which federal courts exercise over the administration of federal criminal justice, appellants were denied the fundamental due process guaranteed by the Fifth Amendment.

III

To the extent that Rules 5(b) and 44 of the Federal Rules of Criminal Procedure in their present form permit counsel at the preliminary hearing for those who can afford to retain counsel but deny counsel at the preliminary hearing to those without funds, such as these appellants, these rules constitute an "invidious discrimination" between the rich and the poor which violates the due process clause of the Fifth Amendment and denies the equal protection of the laws to criminal defendants.

IV

Appellants, imprisoned in default of bond, were denied their constitutional right to a speedy trial because of the lapse of time between their arrest and the filing of the indictment against them, with the accompanying delay in the availability of counsel. The prejudice worked upon the appellants during this period in the preparation of their defense was of such a nature that the accused could no longer "enjoy the right to a speedy and public trial" no matter how expeditiously such trial should thereafter be arranged.

While this Court has held that accused persons awaiting trial for longer periods of time than appellants have not been denied a speedy trial, those cases have not dealt with a situation such as is here presented, in which the delay prior to indictment has worked irreparable injury upon the accused. Once there has been that delay, no trial can be fair and the constitutional right of the accused to a speedy trial has been lost.

which the Government devotes to preparing the prosecution and the defendant who has funds with which to hire counsel expends in preparing his defense:

> ". . . In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." 372 U.S. at 344. (Emphasis supplied.)2/

2/ See also MacKenna v. Ellis, 280 F. 2d 592 (5th Cir. 1960); Maye v. Pescor, 162 F. 2d 641 (8th Cir. 1947); United States v. Germany, 32 F.R.D. 421 (M.D. Ala. 1963). For cases dealing with the right to compel the attendance of witnesses, see Greenwell v. United States, ___ U.S. App. D.C. ___,

Justice Black, speaking for the Court in Gideon, recalled Powell in these words: ". . . While the Court at the close of its Powell opinion did by its language, as this Court frequently does, limit its holding to the particular facts and circumstances of that case, its conclusions about the fundamental nature of the right to counsel are unmistakable. . . ." 372 U.S. at 343.

In the present case, the pretrial motion to discharge appellant Shelton and to dismiss the indictment, and the affidavit of appointed counsel in support of the motion point out that counsel interviewed appellant time after time; made investigations on the premises and surrounding area at the location of the alleged crime; and obtained the assistance of an investigator of the Legal Aid Agency of the District of Columbia in conducting their investigation. Despite these efforts, counsel found that the trail had, in effect, become "cold," Taylor v. United States, 99 U.S. App. D.C. 183, 238 F. 2d 259, 262 (1956), because of the lapse of time before their appointment. Appellant Shelton's motion further sets forth that, by reason of a combination of factors, including appellant's difficulty in recalling events of the

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2/ (continued) 317 F. 2d 108 (1963); United States v. Seeger, 180 F. Supp. 467 (S.D. N.Y. 1960). "The right to counsel is not formal, but substantial." Johnson v. United States, 71 U.S. App. D.C. 400, 110 F. 2d 562, 563 (1940).

night of the alleged crime, his below-normal intelligence quotient, and his limited education, counsel were materially affected in their ability to conduct the factual investigation essential to the defense of appellant's case. Counsel stated that, at the time of their investigation, two possible witnesses could not then be found and that other persons could not then recall the events that occurred at the time of the alleged crime. (Rec.).

The allegations in the indictment are the same as to both appellants.[2a/] Appellant Pannell was arrested at the same time and place as appellant Shelton and he, as well as Shelton, was held in jail because he could not raise bail. The facts recited in the motion and affidavit of appellant Shelton reflect the prejudice imposed upon the accused when, by reason of the delay in their appointment, counsel for Shelton and Pannell could not undertake to gather evidence necessary to the defense of appellants until 61 days after arrest.

The language of Gideon and of cases subsequently decided by the Supreme Court and by this Court lead to the inevitable conclusion that the indigent criminal defendant is entitled to the Sixth Amendment's guarantee

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2a/ As to the effect of the "unitary character of the indictment," see Reid v. United States, ___ U.S. App. D.C. ___, 326 F. 2d 655, 656 (1964), rehearing en banc denied January 10, 1964, cert. denied ___ U.S. ___.

of effective "Assistance of Counsel for his defence" in the preparation as well as in the presentation of his defense.[3/]

In Escobedo v. State of Illinois, ___ U.S. ___, 84 S. Ct. 1758 (1964), Justice Goldberg, speaking for the Supreme Court, fully acknowledged the vital importance of the events which precede the trial in the following language:

> ". . . The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation; and the 'right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination.' In re Groban, 352 U.S. 330, 344, 77 S. Ct. 510, 519, 1 L.Ed. 2d 376 (BLACK, J., dissenting). 'One can imagine

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3/ Judge Fahy noted, in his dissenting opinion in John W. Jackson, Jr. v. United States, ___ U.S. App. D.C. ___, ___ F. 2d ___ (No. 17746, August 13, 1964) (slip opinion at 15):

"In the case at bar the circumstances we have outlined bring it within the exclusionary rule illustrated by the decisions cited. To have had a reasonable opportunity to adopt a course of conduct which would not prejudice his defense appellant needed utterly the assistance of counsel when called upon by the officers to respond to the charge of responsibility for the death of Mr. Lee. If his ensuing confession is used at his trial appellant loses the benefit of counsel for so much of his trial as brings before the jury the self-incriminating statements elicited at the Detention Headquarters when he was without counsel or the advice of counsel. To admit such statements throws the trial back, as it were, to the room where the statements were made, whereas the Constitution calls for the trial in a 'courtroom presided over by a judge, open to the public, and protected by all the procedural safeguards of the law.'"

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> a cynical prosecutor saying: "Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at trial."' Ex parte Sullivan, D.C., 107 F. Supp. 514, 517-518." 84 S. Ct. at 1763.

To the same effect, see Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 1202 (1964).

Many of the recent decisions which have discussed the problem of the right to counsel at pre-trial stages of the proceedings have involved confessions. An inadmissible confession is a tangible result of the lack of counsel to the defendant in the early stages of the proceedings against him. Clearly it is only one of the many prejudicial factors which may irretrievably affect the result of the defendant's trial. Whether an inadmissible confession is elicited from a defendant or whether he is prevented from locating witnesses and gathering facts essential to his defense, the end result is the same. In each instance, the actual trial becomes a sham, whose result has been made certain by the denial of counsel to the defendant at an earlier stage of the proceedings. The Escobedo and Massiah decisions

are unmistakable in documenting the spirit with which the Supreme Court today treats with the problem of preserving the constitutional right of every criminal defendant to a fair trial.[4/]

4/ This concept was well stated in 1961 by Prof. William Merritt Beaney, an eminent authority in the right to counsel, in words which clearly forecast such decisions as Gideon and Escobedo:

"[W]hat is argued here is that the delay in itself is a serious element of unfairness, a proposition that can be tested by asking what would be the reaction of any defendant with means to retain counsel and what would be his counsel's attitude if he were forced to forego the privilege of representation until a week or more had elapsed? This basic unfairness may permeate many trials but without resulting in the kind of tangible evidence of impropriety needed under the 'fair trial' rule. The possible defense witness who is never found, the prosecution witness' story that might have been different if the defense had obtained an early interview, suggest the range of various 'might have been' factors aiding the defense which are eliminated by the tardy appointment of counsel, and when an appellate court determines that a trial is not lacking in fundamental fairness it must of necessity overlook the possible unseen harm of this nature suffered by the defendant. Only if the defense has an opportunity to prepare for trial substantially equal to that enjoyed by the prosecution can a criminal proceeding be considered fair in any realistic sense. This in turn means that counsel, whether retained or appointed, must have access to the accused soon after arrest." Beaney, Right to Counsel Before Arraignment, 45 Minn. L. Rev. 771, 780-81 (1961).

In Escobedo, Justice Goldberg said that "[n]o system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these [constitutional] rights." 84 S. Ct. at 1764. In so saying, he referred to the Report of Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (1963) and set forth the following from that report (pp 10-11):

> "The survival of our system of criminal justice and the values which it advances depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process. * * * Persons [denied access to counsel] are incapable of providing the challenges that are indispensable to satisfactory operation of the system. The loss to the interests of accused individuals, occasioned by these failures, are great and apparent. It is also clear that a situation in which persons are required to contest a serious accusation but are denied access to the tools of contest is offensive to fairness and equity. Beyond these considerations, however, is the fact that [this situation is] detrimental to the proper functioning of the system of justice and that the loss in vitality of the adversary system, thereby occasioned, significantly endangers the basic interests of a free community."

The factual situation in the Escobedo case and the language used by the Supreme Court in reaching its decision would appear to make certain a holding that these appellants have been deprived of fundamental rights. In Escobedo, the burden of the Court's finding was that Escobedo was denied "the assistance of counsel" when the inquiry had focused on him and the police took him into custody and

carried on a process of interrogation in an effort to elicit a confession in the absence of accused's counsel. Escobedo, however, was in a far more favorable position than were these appellants. Counsel had been retained for Escobedo and as a matter of fact, he understood, from a hand wave by his counsel, that his lawyer didn't want him to say anything to his police interrogators and wanted to talk to him. Id., 84 S. Ct. at 1760, n. 1. Let us compare Escobedo's situation with that of appellants here. The inquiry focused on appellants when they were arrested at the scene of the alleged crime and placed in jail. From that point on, through the preliminary hearing and the finding of probable cause, through the incarceration of appellants in default of bail and through their arraignment, appellants were the focus of the inquiry into the crime for which they were ultimately tried. In the instance of Escobedo, a confession was taken from the accused. In the case of appellants, the prosecution was given the insuperable advantage of gathering facts and talking to witnesses while the events of September 22, 1963 were fresh in the minds of those who had knowledge of the alleged crime. In both cases, the effect of the denial of counsel was that the prosecution gained a decisive advantage in the trial of the accused. Since Escobedo had at least the benefit of some aid from counsel and these appellants none, the holding in Escobedo would seem to make

a fortiori a finding that appellants here were unlawfully deprived of their right to counsel.

Recent decisions from other circuits reflect that a lawyer appointed to defend an indigent accused must be appointed in time fully to protect his interests. In Lee v. United States, 322 F. 2d 770 (5th Cir. 1963), it was said: "No one can dispute the truth of Professor Chafee's statement, 'A person accused of crime needs a lawyer right after his arrest probably more than at any other time.' It would not be unreasonable therefore to recognize an accused's right to counsel from the moment of arrest . . . ." at 778.[5/]

A recent case decided by this Court on the issue of "effective representation by counsel prior to trial" is Reid v. United States, supra. The defendants were there convicted of robbery. They were represented by court-appointed counsel at a preliminary hearing the day of their arrest. Seventeen days after defendants' arrest an indictment was filed, and the following day the District Court granted motions for the appointment of counsel. Due to inadvertence or miscarriage

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5/ This statement was quoted with approval by four members of this Court in Jones v. United States, ___ U.S. App. D.C. ___, ___ F. 2d ___, on rehearing en banc (Nos. 17688 and 17690, July 16, 1964) (slip opinion at 17).

of the mails, the notice to counsel of their appointment was not received until after the defendants were arraigned, the arraignment taking place 31 days after arrest. However, one of appointed counsel was notified of his appointment by phone the day before arraignment and, in fact, appeared at arraignment where pleas of not guilty were entered. Appellants contended that (1) the representation by the lawyer appointed at the preliminary hearing was solely restricted to the preliminary hearing and that such counsel did not proceed to aid appellants in the preparation of their defense subsequent to such hearing; (2) notice to counsel of his appointment on the day prior to arraignment did not allow time for counsel to prepare for the arraignment; and (3) the other two defendants had a right to have their counsel present at the arraignment. This Court denied these contentions. With respect to the third contention, the Court stated that the appearance of counsel for one of three appellants at arraignment was sufficient to protect the rights of the other two appellants because of "the unitary character of the indictment, and the joint nature of the subsequent motions to dismiss for lack of counsel . . . and the statement of counsel in oral argument before us that these cases had in substance been treated by counsel on a consolidated basis." Reid v. United States, supra, at 656-657.

The facts of record in this case sharply contrast with the facts in the Reid case. In Reid, appellants had counsel to protect their basic rights at the preliminary hearing; the record shows nothing with respect to the activities of that counsel other than the fact of his appointment and appearance at the preliminary hearing. At least one of the appellants was provided with counsel 31 days after his arrest and that appellant's counsel was present at the arraignment; counsel in Reid, as noted, informed this Court that the cases were treated by counsel on a consolidated basis. The record in our case shows that appellants were not represented by counsel at preliminary hearing nor at arraignment. The most crucial fact in the record of this case is that for 61 days after their arrest appellants were not afforded the opportunity to consult with counsel nor to have the assistance of counsel in the preparation of their defense.

Appellants consider that the decisions of the Supreme Court in Gideon and Escobedo, when taken together with the decisions of this Court, require the conclusion that these appellants were deprived of their constitutional right

to the effective assistance of counsel.6/

Of especial significance to the present case is the language used by Judge Wright in a concurring opinion in Nickens v. United States, ___ U.S. App. D.C. ____, 323 F.2d 808 (1963) in which the Court found that the appellant had not been denied a speedy trial.

6/ Language used by members of the Supreme Court and of this Court reflect the clear tendency toward establishing the principle that an accused is entitled to counsel at the time of his arrest. Chief Justice Warren, Justices Douglas, Black and Brennan expressed the view in 1958 that "the accused who wants a counsel should have one at any time after the moment of arrest." Crooker v. State of California, 357 U.S. 433, 449, 78 S. Ct. 1287 (1958).

The Hon. David L. Bazelon, Chief Judge of this Court, in a lecture delivered on April 8, 1964, "THE FUTURE OF REFORM IN THE ADMINISTRATION OF CRIMINAL JUSTICE," 35 F.R.D. 99, 101, stated:

"With respect to procedural matters, the criminal law is today facing the effect of poverty. The Attorney General's Report on Poverty and the Administration of Federal Criminal Justice is comparable to the Wickersham Report in the significance of its recommendations. It follows two decades in which the bench and bar have reformed first one and then another area where the law delivered less than it promised to the indigent defendant. But reform was undertaken piecemeal, as attention focused first on problems associated with the right to counsel, then on arrests and searches, then on coerced confessions and illegal police behavior. Now the wheel has come full circle and we have a renewed awareness of the crucial nature of the right to counsel. We are beginning to recognize that the assistance of competent counsel is required to safeguard the indigent's constitutional rights. Courts in the vanguard are suggesting that counsel ought to be present not only at formal proceedings but at every point at which the case may be won or lost. This would mean that counsel should be present whenever the police question an arrested man." (Emphasis supplied.)

Judge Wright discussed the situation in which a defendant finds himself when complaint or indictment or arrest is purposefully delayed, saying:

> ". . . With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime. Memory grows dim with the passage of time. Witnesses disappear. With each day, the accused becomes less able to make out his defense. If, during the delay, the Government's case is already in its hands, the balance of advantage shifts more in favor of the Government the more the Government lags. Under our constitutional system such a tactic is not available to police and prosecutors." 323 F. 2d at 813.

In this case, the appellants, in jail and without counsel, may have known that criminal charges were pending against them but this did not avail them. In the words of Judge Wright, their memory and that of other persons grew dim with the passage of time, witnesses disappeared and with each day the accused became less able to make out their defense.

Attorney General Robert F. Kennedy, testifying on May 22, 1963, before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, in support of proposed legislation with respect to the legal representation of indigents, put the case in this language:

". . . Federal courts today continue to delegate the defense of the underprivileged to assigned counsel . . .

* * * * *

"They are not appointed until long after arrest when witnesses have disappeared and leads grown stale."

In the instant case, the witnesses disappeared and the leads grew stale because two months were permitted to pass before these appellants, held in jail in default of bond, were afforded the right to counsel. They have been denied rights guaranteed by the Sixth Amendment. In these circumstances, the case should be reversed with directions to vacate the judgment of conviction and to dismiss the indictment. There is now no remedy for the harm done to appellants in depriving them of the right to advise with counsel while their memories were fresh, while the memories of other persons possessing knowledge of events were fresh and at a time when counsel could have undertaken an investigation with the expectation of gathering all of the evidence which would be helpful to the accused. Through the passage of time, these prerequisites to a fair trial have been irretrievably lost. 1/

1/ This Court noted in Mann v. United States, 113 U.S. App. D.C. 27, 304 F. 2d 394, 396 (1962): "We accept appellant's premise that the constitutional right to a speedy trial is properly enforced by dismissal of the charge when there has been prejudicial delay in bring [sic] the case to trial."

II

THE MANDATE OF THE SIXTH AMENDMENT WHICH REQUIRES THE ASSIGNMENT OF COUNSEL AT EVERY CRITICAL STAGE OF THE PROCEEDINGS WAS, IN THE CIRCUMSTANCES OF THIS CASE, VIOLATED BY THE FAILURE TO AFFORD COUNSEL TO APPELLANTS AT THE PRELIMINARY HEARING AND AT ARRAIGNMENT.

A. FAILURE TO AFFORD THE ASSISTANCE OF ASSIGNED COUNSEL TO THE INDIGENT ACCUSED AT THEIR PRELIMINARY HEARING WAS A DENIAL OF THE CONSTITUTIONAL REQUIREMENT THAT COUNSEL BE MADE AVAILABLE TO A CRIMINAL DEFENDANT AT EVERY CRITICAL STAGE OF THE PROCEEDINGS AGAINST HIM.

When the appellants first appeared before the United States Commissioner for the District of Columbia on September 23, 1963, no inquiry was made as to whether they were able to retain counsel. They were neither offered the assistance of counsel nor informed of their unqualified right to counsel before the Commissioner proceeded with the preliminary examination. The accused were not represented by counsel at the preliminary hearing, during which a Government witness testified against them. (Rec.).

The United States Supreme Court has in recent decisions established standards for determining what proceedings can be constitutionally sanctioned when an indigent defendant is not represented by assigned counsel. Hamilton v. Alabama, 368 U. S. 52, 82 S.Ct. 157 (1961), and White v. Maryland, 373 U. S. 59, 83 S. Ct. 1050 (1963). See also Gideon v. Wainwright, 372 U. S. 335, 83 S. Ct. 792 (1963),

and Douglas v. California, 372 U.S. 353, 83 S. Ct. 814 (1963).

Although the Supreme Court determined that there had been a denial of due process of law when defendants were denied counsel at arraignment in an Alabama court, Hamilton v. Alabama, supra, and at preliminary hearing in a Maryland court, White v. Maryland, supra, the Court noted that the mere use of such procedural terms was not the basis for its holdings. The essential inquiry made by the Court in thosecases was whether the defendant had been deprived of counsel at a critical stage or stages of the proceedings against him, and that concept is controlling here. The question posited by the Supreme Court is: Has defendant been deprived of counsel at a stage of the proceedings against him when substantial elements of his defense require protection? If the answer be in the affirmative, then the Supreme Court requires that defendant be represented by counsel.

The more precise questions raised here are (1) whether, under the circumstances, the preliminary examination was a critical stage of the proceedings against these appellants in the District of Columbia and (2) whether the Commissioner by failing to follow the mandate of the District of Columbia statute deprived appellants of due process of law.

D. C. Code §2-2202 provides in part:

> "The [Legal Aid] Agency shall make attorneys available to represent indigents in criminal proceedings in the United States District Court for the District of Columbia and in preliminary hearings in felony cases . . ." (Emphasis supplied.)

Appellants, both indigents, were not informed of their rights under this statute and were not provided with assigned counsel at the preliminary hearing. This omission, therefore, is a clear violation of the procedural safeguards which are a part of the District of Columbia's system of criminal justice. In Ricks v. United States, __ U. S. App. D.C. __, __F. 2d __, (No. 17771, June 9, 1964) (slip opinion at 4-5, n.2), the Court made this reference to the D.C. Code:

> ". . . D. C. CODE §2-2202, which provides for the assignment of Legal Aid Agency attorneys by the Commissioner 'in preliminary hearings in felony cases,' and requires him 'to provide assignment of counsel as early in the proceeding as practicable.'"

The violation of explicit law with respect to appellants should not be sanctioned by this Court. Sound policy reasons underlie this provision of the statute, and the Court of Appeals, in the exercise of its local supervisory power over criminal administration, should not abide failure to enforce this explicit directive. Ricks v. United States, supra.

In McNabb v. United States, 318 U. S. 332, 63 S. Ct. 608 (1943), it was said:

> ". . . Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force. . . ." Id., 318 U.S. at 340. 7a/

In Ricks' first appearance before a Commissioner he elected to postpone preliminary hearing in order to accept the Commissioner's offer allowing him time to contact counsel or any member of his family relative to securing counsel. 8/ The Court noted that the Commissioner failed to offer to appoint counsel for Ricks if he was indigent. 9/ Judge Bastian, in his dissent in the Ricks case, pointed

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7a/ The scope of the general supervisory power of appellate courts over the administration of criminal justice in Federal courts is well demonstrated by Cicenia v. LaGay, 357 U.S. 504, 508-509, 78 S. Ct. 1297, 1300 (1958), in which the Supreme Court, in a pre-Escobedo decision, upheld a state court conviction based on a plea of non vult which was allegedly actuated by a confession taken during a period of police interrogation in which the defendant was denied the right to confer with a lawyer whom he had already retained. There Justice Harlan, speaking for the Court, said:

"We share the strong distaste expressed by the two lower courts over the episode disclosed by this record. Cf. Stroble v. California, 343 U.S. 181, 197-198, 72 S. Ct. 599, 607, 96 L.Ed. 872. Were this a federal prosecution we would have little difficulty in dealing with what occurred under our general supervisory power over the administration of justice in the federal courts. See McNabb v. United States, 318 U.S. 332, 63 S. Ct. 608, 87 L.Ed. 819." (Emphasis supplied.)

8/ Supra, Ricks v. United States, slip op. at 3-4.

9/ Id., at 4, n. 2.

out that, subsequent to his first appearance before the Commissioner, Ricks appeared before the Commissioner a second time. Upon Ricks' statement at that subsequent hearing that he could not afford to retain counsel, the Commissioner offered to have a member of the Legal Aid Agency represent him. Ricks accepted the offer; counsel was appointed; and following a conference between Ricks and his attorney a preliminary hearing was requested and held.[10/] Judge Bastian concluded, in view of these facts, "Ricks was accorded all appropriate safeguards . . ."[11/] Judge Bastian went on to point out that "[E]ven if the two sections [D. C. Code §§2-2202, 2-2203] are read to require the Commissioner to inform the accused of the availability of an oath asserting indigence, it is more than dubious that Ricks could have submitted to such an oath."[12/] In the instant case the record shows that in appellants' first appearance they were not even offered the opportunity to postpone the hearing for the purpose of contacting counsel, nor were they offered a member of the Legal Aid Agency to represent them during their preliminary hearing.

Courts in the District of Columbia have a special duty to set a high standard with respect to procedural

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10/ Id., at 28.
11/ Id., at 29.
12/ Id., at 32.

safeguards in criminal cases. As Judge Edgerton noted in Jones v. United States, ___ U.S. App. D.C. ___, ___ F. 2d ___, (Nos. 17688 and 17690, July 16, 1964) (slip opinion at 11):

> ". . . The 'Court, in its decisions, and Congress, in its enactment of statutes, have often recognized the appropriateness of one rule for the District and another for other jurisdictions so far as they are subject to federal law.' Griffin v. United States, 336 U.S. 704, 712 (1949). The courts of the District of Columbia should not content themselves with enforcing the minimum standards which the Constitution requires. They should also set for the Nation an example of respect for the rights of citizens."

Clearly, the violation of appellants' procedural right to have counsel at this preliminary hearing, a right granted in the exercise of sound policy by Congress and codified into law for the courts of the District of Columbia, should not be disregarded.

In Escobedo v. United States, supra, the Court held that the police violated the accused's Sixth Amendment right to assistance of counsel when his request for the opportunity to consult with counsel during the process of police interrogation was denied. The Court further held that failure to advise the accused of his absolute right to remain silent during a police interrogation violated the Fifth Amendment.

In the instant case, the appellants appeared without counsel at their preliminary examination. During the

preliminary examination, the United States Commissioner set appellants' bail at $2,000.00 each, made a finding of probable cause for their arrest and committed them to the District of Columbia Jail. (Rec.). If counsel had been present at appellants' preliminary examination, they could have requested the Commissioner to reduce bail or to release the accused on their own recognizance[13/] or to summon witnesses on their behalf.

In Washington v. Clemmer, ___ U.S. App. D.C. ___, ___ F. 2d ___, (No. 18602, May 11, June 12, 1964) (slip opinion), this Court emphasized that the preliminary hearing is a critical stage of the proceedings against a criminal defendant. The Court reversed the conviction because the defendant had not been afforded a transcript of the testimony in the preliminary hearing. The discussion by the Court is here apposite:

> "The appellant requested the Commissioner to obtain a stenographic reporter for the preliminary hearing. As the Government concedes in its petition,

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13/ Attorney General Robert F. Kennedy in an address to the Criminal Law Section of the American Bar Association, August 10, 1964, stated:

"We have been deeply concerned about the effect of bail on the poor man. The Allen Committee looked into the question extensively. It recommended that release on recognizance be increased wherever possible at the Federal level and we have followed that recommendation.

"In March, 1963, shortly after receiving the Committee's recommendations, I instructed all United States Attorneys to recommend that every possible defendant be released without bail. In the first year afterwards, such releases tripled. The default rate, 2.5 percent, is about the same as that for those released on bail."

the Commissioner has the authority to secure a reporter for his hearings. The Commissioner's failure to grant the request here was error.

"Generally it would be desirable to record the testimony given at every stage of the criminal process. The preliminary hearing is an adversary judicial proceeding necessary to authorize continued constraint of the accused. Absence of a transcript makes it difficult, if not impossible, to review the Commissioner's finding of probable cause. And verbatim recording of testimony at an early stage of the process perpetuates the fresh memory of witnesses, making it available in case of subsequent death, disability, or flight, and allowing impeachment or refreshing of recollection at trial. Accordingly, early recording also serves to discourage threats against witnesses and suborning of perjury.

"And even if the absence of a transcript might ultimately be found not prejudicial, obviously it is not possible to predict such an eventuality, and the Commissioner should therefore ordinarily grant a request for a reporter." Id., slip op. May 11, 1964, at 3-4. (Emphasis supplied.)

In Ricks v. United States, supra, this Court re-examined the holding in Council v. Clemmer, 85 U.S. App. D.C. 74, 177 F. 2d 22 (1949) cert. denied, 338 U.S. 880 (1949). At one time the Council case was interpreted as standing for the proposition that "there is no constitutional requirement that the accused be represented by counsel on arraignment where he pleads not guilty . . . [or] at the preliminary hearing where he pleads not guilty." Id., at 177 F. 2d 23. This Court in Ricks described Council as holding that "a conviction is not subject to collateral attack merely because counsel was absent during pre-trial

proceedings, unless that absence prejudiced the accused at trial. Hamilton v. Alabama, and White v. Maryland, supra, cast doubt on the Council doctrine that a lawyer is necessary at a preliminary hearing or arraignment only if a defendant pleads guilty." Ricks v. United States, supra, note 2 at 4-5 of slip opinion. (Emphasis supplied.) In Ricks the Court lay emphasis on Wood v. United States, 75 U.S. App. D.C. 274, 128 F. 2d 265 (1942), which held that a preliminary hearing results in prejudice to a defendant where he sustains a "temporary loss of liberty."

In view of the Supreme Court's decision in Gideon and Escobedo and this Court's re-examination of Council v. Clemmer in the Ricks case, appellants consider that the proper principles are those set forth by Judge (later Justice) Rutledge in the Wood case, which required that the accused should be expressly informed of his unqualified right to counsel before permitting him to speak:

> "The fairer practice and, we think, the only one consistent with the court's position, would advise the accused in all cases, before permitting him to speak even as a volunteer, of his right to counsel and would warn him that he need not speak and, if he does, it is at his peril. This would assure fairness to the accused and foreclose the possibility that he might act in ignorance. It would eliminate the risk of reversal inherent in failure to give the advice or warning. The cost to the court in time and energy would be small, and that to society in efficient administration of criminal justice would be less than the prevailing practice

> entails. On the other hand, the cost to the accused, especially when he is indigent, of the court's failure to follow the more open and certain way may be great. . . ." 128 F. 2d at 277. (Emphasis supplied.)

Rule 5(b) of the Federal Rules of Criminal Procedure if literally followed would require only that the accused be informed by the Commissioner of his right to retain counsel. The Wood case would require the Commissioner to inform the accused of his "right to counsel" without adding the qualifying words "to retain" after the word "right." Council v. Clemmer did not challenge the holding in Wood with respect to the duty of the Commissioner to inform the accused of his right to counsel before holding the preliminary hearing. Appellants reading Wood together with the Ricks case, urge that an initial and preliminary requirement which the Commissioner has a duty to perform even before holding a preliminary hearing is to inform the accused of his unqualified right to counsel. The second and more important requirement is that the Commissioner has a duty to provide counsel for the accused at this critical stage of the proceedings.

The Advisory Committee on Criminal Rules has proposed amendments to Rules 5(b)[14/] and 44[15/] of the Federal

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14/ Proposed Amendments to Rules of Criminal Procedure for the United States District Court, 34 F.R.D. 415-416, (1964).

15/ Id., at 442-443.

Rules of Criminal Procedure. An amendment to 5(b) would require that the Commissioner inform the defendant not only of "his right to retain counsel" but also of his "right to request the assignment of counsel if he is unable to obtain counsel."

The proposed amendment to Rule 44 would entitle any defendant who is unable to obtain counsel "to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the Commissioner or court through appeal, unless . . . [defendant] waives such appointment." The Advisory Committee's Note on the proposed amendment to Rule 44 states: "A new rule is provided as a substitute for the old to provide for the assignment of counsel to defendants unable to obtain counsel during all stages of the proceedings. The Supreme Court has recently made clear the importance of providing counsel both at the earliest possible time after arrest and on appeal."[16/] The note then cites such cases as Crooker, Gideon, Cicenia and Douglas and other authorities such as Report of the Attorney General's Committee on Poverty and the Administration of Justice. In view of these proposed amendments and the accompanying notes, it is clear that the Advisory Committee has concluded that existing Rules 5(b)

16/ Ibid.

and 44 do not conform to the constitutional requirement for effective assistance and appointment of counsel as made evident in recent decisions of the Supreme Court.

Prior to appellants' preliminary hearing they were not informed of their right to counsel, but only of their right to retain counsel. (Rec.). Furthermore, appellants should have been afforded counsel at the preliminary hearing because the effect and result of the hearing was prejudicial to them. The Commissioner's failure to protect appellants' rights before and during the preliminary hearing and the Commissioner's utter disregard of his duty to provide assigned counsel resulted not in a mere "temporary loss of liberty" as noted in the Wood case, but in imprisonment for 61 days without the opportunity to consult with counsel or to benefit from the assistance of counsel in the preparation of their defense.

At the preliminary hearing on September 23, 1963, a critical issue was considered and resolved against the appellants. At that proceeding, the freedom of the appellants was the issue: freedom if they could rebut probable cause; imprisonment if they should fail. It certainly cannot be said that the resolution of this issue was not a critical one at which the aid of an attorney was necessary. It is clear that the preliminary hearing was a critical stage of the proceedings against the appellants in that constitutional

rights and safeguards, such as the privilege against self-incrimination, the right to compulsory attendance of witnesses and the right to have a transcript, were at stake. To require the protection of some, but not all, constitutional rights at a preliminary hearing and to fail to require that effective appointment and effective assistance of counsel be offered an indigent defendant while his freedom and the deprivation of his rights and privileges hang in the balance is an anomaly which should no longer be sanctioned by this Court, in the light of the applicable statutory provisions and recent decisions of this Court.

B. FAILURE TO AFFORD THE ASSISTANCE OF ASSIGNED COUNSEL TO THE INDIGENT ACCUSED AT THEIR ARRAIGNMENT WAS A DENIAL OF THE CONSTITUTIONAL REQUIREMENT THAT COUNSEL BE MADE AVAILABLE AT EVERY CRITICAL STAGE OF THE PROCEEDINGS AGAINST THEM.

At arraignment, appellants entered pleas of not guilty to housebreaking and to destruction of movable property. The Court also heard Shelton's pro se motion for reduction of bond and denied the motion. Counsel for appellants were not present at the arraignment. On the day of arraignment counsel for Shelton received in the mail notice of his appointment to represent the appellant. This notice informed counsel of the week set for appellants' trial but

failed to inform counsel of the setting of appellant's arraignment and hearing on motion for reduction of bond. (Rec.).

In Federal courts the arraignment is a critical stage in the proceedings against an accused and the indigent accused is entitled to be represented by appointed counsel. The doctrine of Council v. Clemmer, supra, to the extent that it is inconsistent with this statement of the law appears clearly to be no longer controlling in the District of Columbia nor in any other Federal jurisidiction.[17/] In the Supreme Court's decision in Hamilton v. State of Alabama, 368 U.S. 52, 82 S. Ct. 157 (1961), Justice Douglas noted:

> "Arraignment has differing consequences in the various jurisdictions. Under federal law an arraignment is a sine qua non to the trial itself - the preliminary stage where the accused is informed of the indictment and pleads to it, thereby formulating the issue to be tried. Crain v. United States, 162 U.S. 625, 644, 16 S. Ct. 952, 958, 40 L.Ed. 1097; Rules 10 and 11, Federal Rules of Criminal Procedure, 18 U.S.C.A. . . ." Id., n. 4 at 4-5.

In Evans v. Rives, 75 U.S. App. D.C. 242, 126 F. 2d 633 (1942), this Court had occasion to consider the petition of a defendant who was without counsel at the time of his arraignment when he entered a plea of guilty. In discussing the nature of the arraignment as an important and critical stage of the proceedings against a defendant, this Court said:

17/ See supra at 39-41.

". . . Since as stated in Johnson v. Zerbst a waiver is an intentional relinquishment or abandonment of a known right or privilege, and since the petitioner did not know and was not advised of his right to counsel, he could not waive the same.

"Since this is true and since, as said in Johnson v. Zerbst, 'The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel,' the contention of the District of Columbia in the instant case that the petitioner's conviction was valid amounts in effect to an assertion that the constitutional guarantee that in criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense does not apply at the arraignment, where the accused is required to stand at the bar, to hear the charge, and to enter a plea. But an accused is no less an accused at that stage of the proceedings than at any other, and, as we have pointed out above, no less in need at that stage than at any other of the assistance of counsel. The constitutional guarantee makes no distinction between the arraignment and other stages of criminal proceedings in respect of the application of the guarantee. [Emphasis supplied.] As said in the statement quoted from Johnson v. Zerbst, '"If charged with crime, he [the accused] is incapable, generally, of determining for himself whether the indictment is good or bad. . . . He requires the guiding hand of counsel at every step in the proceedings against him."' (Italics supplied)." 126 F. 2d at 641.

Furthermore, no distinction should any longer be drawn between an arraignment where a defendant pleads guilty and one where he pleads not guilty. Hamilton v. Alabama, supra.

In Jones v. United States, supra, four members of this Court noted with respect to a criminal defendant's right to counsel:

> ". . .The right to counsel does not begin at trial. If it began then it would often be worth little, for cases are often lost at earlier stages. The accused 'requires the guiding hand of counsel at every step in the proceedings against him.' Powell v. Alabama, 287 U. S. 45, 69 (1932). This is a constitutional principle, not a mere factual observation. Accordingly the accused is entitled to counsel at arraignment. Hamilton v. Alabama, 368 U. S. 52 (1961); Evans v. Rives, 75 U. S. App. D. C. 242, 250, 126 F.2d 633, 641 (1942)." Jones v. United States, supra, at 15. (Emphasis supplied.)

Appellants' constitutional rights to effective assistance of counsel as well as their statutory rights to the effective appointment of counsel had been irretrievably denied prior to the time of their arraignment. 17a/

On November 8, 1963, 47 days after his arrest and fourteen days prior to his arraignment, appellant Shelton executed a pro se application to proceed without costs in which he attested to his poverty and expressly requested that the Court appoint an attorney to advise him and prepare his defense. At the same time he executed a motion for reduction of bond. (Rec.). The November 8 request for counsel was not acted upon by the Court.

By no fault of appellants or counsel but by reason of the failure of the Court to seasonably notify counsel of their appointment and of the arraignment, no counsel were present at the arraignment. At the time of the arraignment, the presiding judge, with the record before him, was or should have been aware that notice to counsel of their

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17a/ Under the mandate of D.C. Code §2-2202 it seems certain that appellants were entitled to the assistance of counsel at arraignment.

appointment had not been mailed until the previous day. Under the circumstances, the Court should not have heard appellant Shelton's motion for reduction of bond or allowed appellants to enter pleas until they had consulted with counsel.

When the trial court made no provision for the presence of counsel at appellants' arraignment, it denied to them assistance at a stage of the proceedings which was sine qua non to the trial itself. Under the circumstances, appellants were deprived of the assistance of counsel guaranteed to them by the Constitution.

Notwithstanding the panoply of safeguards which Congress and the courts have built into the structure of Federal criminal administration, basic rights and privileges, rooted in the Sixth Amendment and underlying the concept of due process, were never offered nor communicated to appellants.

Appellant Shelton, moved perhaps by the same sense of injustice which led Clarence Gideon to pursue his cause to the Supreme Court, requested in vain the assistance of counsel two weeks before his arraignment.

Judge Wright stated in Nickens, supra, "with each day, the accused becomes less able to make out his defense." These appellants and justice itself were the losers thereby; a right guaranteed by the Constitution was denied.

III

AS THE RIGHT TO RETAIN COUNSEL FOR THE PRELIMINARY HEARING IS ABSOLUTE, IT IS A DENIAL OF THE EQUAL PROTECTION OF THE LAWS TO FAIL TO ASSIGN COUNSEL TO AN INDIGENT DEFENDANT FOR THE PRELIMINARY HEARING.

When appellants were first brought before the United States Commissioner for preliminary examination on September 23, 1963, they were informed of their right to retain counsel and to a preliminary hearing. The appellants lacked funds to retain counsel.

Rule 5(b)[18/] of the Federal Rules of Criminal Procedure in its present form requires the Commissioner to inform the accused, among other things, "of his right to retain counsel," and further to "allow the defendant reasonable time and opportunity to consult counsel."

Rule 44[19/] of the Federal Rules of Criminal Procedure as now written and the Advisory Notes to that Rule are to this effect:

> "The rule is intended to indicate that the right of the defendant to have counsel assigned by the court

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18/ The proposed change in Rule 5(b) demonstrates that the present view is that assigned counsel should be offered to indigent defendants at this early stage of the proceedings. See supra at 8.

19/ The proposed change in Rule 44 similarly reflects the purpose to provide counsel at every stage of the proceedings. See supra at 8.

See also the Advisory Committee's Note, 34 F.R.D. 443, and articles and cases cited therein. See also the discussion of this problem in Ricks v. United States, ___ U.S. App. D.C. ___, ___ F. 2d ___ (No. 17771, June 9, 1964)(slip opinion at 4, n. 2).

> relates only to proceedings in court and, therefore, does not include preliminary proceedings before a committing magistrate. Although the defendant is not entitled to have counsel assigned to him in connection with preliminary proceedings, he is entitled to be represented by counsel retained by him, if he so chooses, . . ." 18 U.S.C.A. Rule 44, Notes of Advisory Committee on Rules, n. 2.

To permit defendants to be represented by retained counsel at the preliminary hearing but to refuse to assign counsel for the hearing is an "invidious discrimination" between the rich and the poor which violates the Fifth Amendment's due process clause and denies the equal protection of the laws. Griffin v. Illinois, 351 U.S. 12, 76 S. Ct. 585 (1956). See also Hardy v. United States, 375 U.S. 280, 84 S. Ct. 424 (1964); Lane v. Brown, 372 U.S. 477, 83 S. Ct. 768 (1963); Coppedge v. United States, 369 U.S. 438, 82 S. Ct. 917, 921-22 and cases cited at n. 13 (1962).

A defendant in a criminal case in the District of Columbia is plainly entitled to the equal protection of the laws. Any doubt as to the validity of this proposition was resolved in Bolling v. Sharpe, 347 U.S. 497, 74 S. Ct. 693 (1954):

> ". . . The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore,

> we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process." Id., 347 U.S. at 499.

The provision in Rule 5(b) that the defendant in a criminal case shall have a right to retain counsel and to have time to secure advice from counsel is a patent admission that the aid and advice of counsel is critical at this, the first accusatorial stage of the proceedings. If, then, the advice of counsel is essential at the preliminary hearing, and provision is made only for the advice of retained counsel, it is a clear denial of the equal protection of the laws not to afford counsel to indigent defendants, such as this appellant, who are unable to retain counsel, but who are equally in need of the advice of counsel.

The holding in Griffin v. Illinois, supra, sets out the mandate of the United States Supreme Court that no distinction shall be made between the rich and the poor where procedural safeguards of an accused are concerned. In holding that an indigent defendant must not be denied a copy of the trial record for purposes of appeal because he could not pay for it, Justice Black said:

> "Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. This hope, at least in part, brought about in 1215 the royal concessions of Magna Charta: . . . In this tradition, our own constitutional guaranties of due process and equal

protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system - all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' . . .

"Surely no one would contend that either a State or the Federal Government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in court. Such a law would make the constitutional promise of a fair trial a worthless thing. Notice, the right to be heard, and the right to counsel would under such circumstances be meaningless promises to the poor. In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial. . . ." 351 U.S. at 16-18. (Emphasis supplied.)

So here, the ability to pay for counsel has no rational relationship to the need for legal assistance by the accused and if the rich may have counsel at the preliminary hearing so too must the poor.

This Court recently recognized in Washington v. Clemmer, supra, that those rights at a preliminary hearing which are afforded to defendants able to pay for them must not be denied to those unable to pay for them merely because they are poor. The ruling of this Court in dealing with the request to have a reporter present at the preliminary hearing and to subpoena witnesses is equally pertinent to the need for assigned counsel:

> "We also think this course is required by minimal standards of fair and equal justice. Defendants who have funds are entitled to employ their own reporters. To deny this opportunity to an indigent defendant would be to permit invidious discrimination based on wealth. Furthermore, since the Government may have a reporter at the hearing, the accused must be afforded the same right in order to meet the requirements of fundamental fairness."
>
> * * * * *
>
> ". . . Whatever procedures are worked out, of course, must be such that no barriers are faced by the indigent accused in the securing of witnesses that are not faced by the wealthy." Id., at 4-5, 6-7 (slip opinion, May 11, 1964).

Under our system of equal justice for all, a rule which permits counsel at a preliminary hearing for an accused who can afford to hire a lawyer but denies counsel to one who is without funds constitutes the rankest form of discrimination and should be struck down.

IV

APPELLANTS WERE DENIED A SPEEDY TRIAL.

Prior to trial, counsel for appellant Shelton moved that Shelton be discharged for want of a speedy trial and that the indictment be dismissed, alleging that the rights of appellant had been substantially prejudiced by reason of the lapse of time between his arrest and the filing of the indictment,[20/] the attendant delay in the appointment of counsel following arrest and the imprisonment of appellant because he could not buy a bail bond. (Rec.). There was annexed to the motion the affidavit of court-appointed counsel, setting forth facts evidencing that, by reason of the delay, appellant could not recall for his counsel facts related to the charge against him in order to enable counsel to conduct the factual investigation essential to the defense of the case. (Rec.). As we have heretofore noted, the facts recited in the motion

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20/ It is clear that denial of a speedy trial may result from delay at any stage of the proceedings. In Mann v. United States, 113 U.S. App. D.C. 27, 304 F. 2d 394, 396, n. 4 (1962), this Court said: "While the point is not important here, we note that in our view, and contrary to some recent opinion, see, e.g., Foley v. United States, 8 Cir., 290 F. 2d 562; Venus v. United States, 9 Cir. 287 F. 2d 304, the constitutional guarantee protects against undue delays in presenting the formal charge as well as delays between indictment and trial." See also Nickens v. United States, ___ U.S. App. D.C. ___, 323 F. 2d 808 (1963) (concurring opinion of Judge Wright at 812).

and affidavit of Shelton reflect the prejudice imposed upon Pannell since he too was in jail in default of bond and his counsel, as a result of the delay in his appointment, could not undertake to gather evidence until 61 days after Pannell's arrest.

While this Court has had occasion to hold that accused persons awaiting trial for longer periods of time than appellants have not been denied a speedy trial, no such case has presented a situation such as this one in which there has been a lapse of 61 days between the arrest of indigent and imprisoned accused and the availability of counsel to them after a delay in the return of the indictment. This period of time is crucial to the defendant in a criminal case. The accused who can afford counsel is in a position to communicate with his attorney immediately to give his account of events, to supply the names of witnesses in his behalf and to furnish the evidentiary leads which are vital to the preparation of an adequate defense. On the contrary, an accused in jail for two months without counsel, as were appellants, has none of these advantages. He has no attorney to whom he may give his account of the events which resulted in his arrest; he has no way of knowing which facts are important and which are not; he is unable to talk to those who may be able to

testify in his behalf; his own memory and that of other possible witnesses invariably fade as each day passes. Under the circumstances such as those presented by the delay in this case, it is impossible to determine ex post all of the evidence which has been lost to the defense and to conclude other than that irreparable prejudice has been inflicted upon the accused by the delay in making counsel available to them.

As noted in Smith v. United States, decided en banc, ___ U.S. App. D.C. ___, ___ F. 2d ___, (No. 17106, February 20, 1964) (slip opinion at 6), the Supreme Court, in Beavers v. Haubert, 198 U.S. 77, 87, 25 S. Ct. 573 (1905), said that the right of a defendant to a speedy trial is "necessarily relative" and is "consistent with delays and depends upon the circumstances." This Court in Smith went on to say (Id., at 6-7) that "the authorities demonstrate that the balance between the rights of public justice and those of the accused has been upset against the Government only where the delay has been arbitrary, purposeful or oppressive." Under the "circumstances" of this case, it is the position of appellants that the delay to which they were subjected was "oppressive," in that it denied to them the means with which to prepare their defense to the crime with which they were charged.

A review of recent cases in which this Court has dealt with the speedy trial issue, including Smith v. United States, supra; Porter v. United States, 106 U.S. App. D.C. 150, 270 F. 2d 453 (1959), cert. denied 363 U.S. 805, 80 S. Ct. 1240 (1960); King v. United States, 105 U.S. App. D.C. 193, 265 F. 2d 567 (1959), and Reid v. United States, supra, makes evident their distinction from this case. In none of those cases was there the delay between arrest and the availability of counsel such as here existed nor in any of those cases did the delay in appointing counsel work the prejudice which was visited upon these appellants.

As this Court stated in Taylor v. United States, 99 U.S. App. D.C. 183, 238 F. 2d 259 (1956), "[I]t is the combination of factors . . . which motivates our decision." Id. at 262. In Taylor, the Court noted the following factors considered by it in reversing for lack of a speedy trial:

> ". . . The long lapse of time between the commission of the offenses and the trial, the incarceration of appellant throughout the entire interim, and the resulting handicap to the procurement of witnesses who might have supported appellant's alibi, or any other defense, must seriously have handicapped the preparation of a defense. This harm could have been avoided by an earlier indictment and notice to appellant that he had been indicted. Upon such notice, appellant or his counsel could have made 'an affirmative request or demand for trial,' and appellant, his friends and counsel could have proceeded to an investigation before the trail became cold. . . ." Id., at 262. (Emphasis supplied.)

In cases such as Smith, supra, and King, supra, this Court was primarily concerned with the calendar system of the District Court, which deals with the period between arraignment and trial. That is not this problem. Here the harm had been done at an earlier stage - between arrest of the accused and arraignment. If the delay during that period, as in this case, denies a fundamental right, then there is nothing that can be done with the calendar system to correct the evil; the right to a speedy trial has already been lost for all time. The accused could no longer "enjoy the right to a speedy and public trial" no matter how expeditiously such trial should be arranged. Just as this Court examined into the calendar system of the trial court, it is appropriate that under its supervisory powers it should scrutinize the existing District Court procedures which permitted these appellants to remain in jail without counsel for a period of 57 days before indictment and 61 days before counsel were made available to them. McNabb v. United States, 318 U.S. 332, 340-41, 63 S. Ct. 608, 613 (1943).

In this case, the delay was such that "appellant[s], his [their] friends and counsel" could not proceed "to an investigation before the trail became cold" and appellants have been denied their constitutional right to a speedy trial.

CONCLUSION

For the foregoing reasons appellants submit that their convictions should be reversed and the case remanded with directions to vacate the judgment of conviction and to dismiss the indictment.

Respectfully submitted,

/s/ Samuel K. Abrams
SAMUEL K. ABRAMS

/s/ Bernard M. Beerman
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellants has been hand-delivered to the attorney for appellee: The United States Attorney at the United States Courthouse, Constitution Avenue and John Marshall Place, Washington, D. C., this 10th day of September, 1964.

/s/ Bernard M. Beerman
BERNARD M. BEERMAN

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,793

NATHANIEL SHELTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 18,794

ROBERT B. PANNELL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
JOHN A. TERRY,
MARTIN R. HOFFMANN,
Assistant United States Attorneys.

QUESTIONS PRESENTED

1) Were appellants' rights to a speedy trial denied where there was a "delay" between arrest and trial of only four months, where the matter was not raised at trial and no trial prejudice is shown?

2) Was there an abridgment of appellants' rights under the Fifth and Sixth Amendments warranting dismissal of the indictment, because they were not represented by appointed counsel at their presentment, where (a) no motion to dismiss on this ground was made below; (b) no prejudice arose from counsel's absence at either proceeding and (c) no authority or reason is shown for dismissal of the indictment on these grounds?

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United States Court of Appeals

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Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Police found appellants hiding on storage shelves under piles of loose laundry on the premises of the Quick Serv-

ice Laundry between 3:00 and 4:00 of a Sunday morning, September 22, 1963 (Tr. 10, 32, 40, 53, 67, 116-117, 143). Adjacent to the storage room sat a 1700 pound safe which had been completely ruined in an abortive attempt to secure money that still lay within (77-78, 86-87). Passing patrolmen had been alerted by sounds of metallic pounding and scraping from the laundry; after calling the precinct to confirm the presence and location of a safe and request aid, they covered the front and rear of the premises noting a broken rear second-story window in so doing (Tr. 11-13, 28-31, 44-46, 52). They were soon reinforced; having entered the building by crawling through the window, police discovered two others similarly situated with appellants under the laundry: Tyler Haynes (who continued association with them as a defendant at their trial) and one Jolly Walker, a juvenile (Tr. 32, 40, 52-54, 67-70, 116-117, 143).

Appellants appeared before the Commissioner on September 23, 1963. The Commissioner's records show they were read the complaint, and told of their rights to have a preliminary hearing and retain counsel; they were warned that they need make no statement since it could be used against them; they were advised that they might have a preliminary hearing wherein the witnesses against them might be examined and evidence on their own behalf might be introduced. Appellants requested an immediate hearing (Commissioner's Docket). The record of the hearing indicates the Government produced one witness, one of the police who had discovered them in the building. The defendants then presented testimonial matter to the effect that some other persons were already in the building, and appellants had entered only on their invitation. Following the hearing, appellants were committed to jail in lieu of $2000 bond.

An indictment for housebreaking and destroying movable property of valuation in excess of $50.00 was returned on November 18, 1963. Appellants were arraigned thereupon on November 22, 1963, pleading not

guilty; counsel had been appointed but were not present. At this proceeding appellant Shelton's motion for reduction of bond was denied by Judge McLaughlin. The case was set for trial during the week of January 6, 1964 (Supp. Tr. I, 2-6).

On January 15, 1964, appellant Pannell filed a *pro se* motion to dismiss the indictment as faulty in its failure to describe the intent necessary to charge the crime of housebreaking.

On January 17, 1964, appellant Shelton, through his counsel, filed a motion to dismiss the indictment for lack of speedy trial. Attached to this motion was an affidavit by one of appellant's counsel which set forth the basis for the motion. The affidavit stated that the delay between arrest and indictment had caused difficulty to appellant in recalling what took place prior to and at the time of the alleged crimes. Moreover, Shelton's attorney swore that inadequate description by Shelton was the cause of inability to locate "certain persons" described by Shelton: two of four named witnesses could not be found; the other two—when interviewed—could not recall the events that occurred at the time of the alleged crimes; and Shelton's movements on the fatal eve prior to entry of the laundry could not be determined.

These motions were before the assignment court on the morning of trial (Supp. Tr. II, 2-3). Shelton's motion for speedy trial was referred to the trial judge for hearing, being "formally denied" by the assignment judge. Pannell—at no time joining in Shelton's motion—found his motion also denied.

Trial of the cause commenced that same day. The presence of appellants in the building at arrest was not contested. Rather, the defense sought to show that theirs had been an innocent entry, and that Shelton was too intoxicated to be able to form specific intent. Accordingly, appellant Shelton testified in his own behalf, recalling with some particularity that he had preluded the evening by consuming a pint of whiskey and fifth of wine; he had gone to a party, consumed some punch (alcoholic

or not he could not detect at the time) and met a former girl friend who asked what was wrong with him, going off to dance when he denied anything was amiss; the next thing he recalled, Shelton was outside in the backyard with a friend he recognized as Arthur Harris; unhooking the gate, Shelton went into the alley and commenced "drifting"; drifting out of the alley he again saw Harris who hollered at him; after "walking and walking," Shelton came across Haynes and Pannell sitting on the step of a beauty parlor at 5th and G Streets; they all went to a pool room between 14th and 15th on H Street, where Shelton sat on a stool, not wanting to play pool; at this juncture he drank some gin from a pint bottle Haynes had produced; at closing time—now joined by Jolly Walker—the four repaired to the Hickory Nut for coffee; thereafter, on the way through an alley to Tyler Haynes' house, they came across a boy known to defendant Haynes as "Skip" who was coming down a telephone pole next to the laundry followed by a friend of his; the four's climb to the roof of the laundry building was punctuated by Shelton's falling off the pole; once on the roof they observed a person emerge from a window on the side of the building, so they entered that window. Once inside Shelton recalled seeing the safe—the back of which was ripped—and some tools on a desk-top. His testimony continued that he had not intended to steal anything at the time he entered; that there had never been discussion of entering the laundry prior to the arrival at the building; and that he had nothing to do with the safe once inside. He admitted taking cover upon the arrival of the police. (Tr. 96-112, 114-117.)

Shelton then called Arthur Harris, who disclosed he did see Shelton the evening of September 21, 1963, and that Shelton—alcohol on his breath—had passed out. After an attempt to put Shelton in a cab, Harris left the party. At 11:00 p.m. that same night, he again saw Shelton, this time standing on a corner at 13th and D Streets (Tr. 117-123).

Defendant Haynes testified that their entry of the window followed the departure from the premises of two other boys he recognized; that once inside he and Shelton had run to a window in time to see the arrival of the police; and that upon seeing a fire engine, they all ran and hid (Tr. 132-136). To the police, Haynes stated he had given "no definite answer why I went in there or why I didn't," while denying that he or the others had anything to do with the safe (Tr. 138-140). But apparently he had been in the building before (Tr. 136).

Appellant Pannell invoked direct testimony from both Shelton and Haynes that to the best of their recollection, Pannell had done nothing to the safe once inside the building (Tr. 112-114, 140-141).

The government produced rebuttal evidence tending to show Shelton was not intoxicated at the time of his arrest (Tr. 145, 147). Counsel for Shelton requested instructions on drunkenness as a defense to the specific intent required for a housebreaking conviction, and the jury was accordingly instructed (Tr. 148-149, 167-168).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Title 22, District of Columbia Code, Section 1801, provides:

> Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> . . . [Nor] shall any person . . . be deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .

SUMMARY OF ARGUMENT

On its face, appellants' claim that a four-month period of time between arrest and trial is frivolous. Since he made not his motion in the trial court, and since the trial record suggests not the slightest prejudice from the delay, the claim is utterly meritless.

No substantial rights of appellants were abridged by their uncounseled presentment and arraignment. Neither the Sixth nor the Fifth Amendment to the Constitution generates a requirement for counsel in the circumstances of this case, where *inter alia* (a) the points were not raised in the trial court; (b) no prejudice was occasioned by counsel's lack; and (c) no authority or reasoning suggests that a new rule of law is necessary to protect the rights of an indigent to have appointed counsel at every critical stage of the proceedings against him.

ARGUMENT

I. The claim that speedy trial was denied appellants is without merit.

(See Tr. 96-112, 114-123, 132-135, 148-149; Supp. Tr. II, 2).

Appellants were tried on January 20, 1964 for their crime of September 22, 1963. "Delay" of four months is asserted to have worked such a deprivation of their rights as to require preclusion of the public's right to

punish them for their offense. They realize that the claim is unprecedented; but they urge that a sixty-one day period after arrest (which included presentment and preliminary hearing) during which they were uncounseled is the touchstone to dismissal of the indictment. (Br. 19-20, 22-23, 28, 54-56.)

Appellants own that the right to speedy trial is "necessarily relative", and involves a balancing of the rights of public justice and the rights of the accused in the circumstances of the particular case (Br. 56). *Beavers* v. *Haubert*, 198 U.S. 77, 87 (1905); *Smith* v. *United States*, —— U.S. App. D.C. ——, 331 F.2d 784 (1964). But determinative of whether speedy trial denial has occurred is the extent of prejudice to substantial rights of the accused to a fair trial: the Sixth Amendment to the Constitution contemplates more than a situation resulting simply in inconvenience or hardship. *King* v. *United States*, 105 U.S. App. D.C. 193, 264 F.2d 567, *cert. denied*, 359 U.S. 998 (1959); *James* v. *United States*, 104 U.S. App. D.C. 263, 264 F.2d 381 (1958). Proper assessment of an asserted lack of a fair trial at the appellate level includes consideration of the nature of the issues and the defense involved, whether notice of the charges was timely given, the defendant's situation and location prior to the trial, the extent to which the delay was procured by the prosecution and—in short—whether the delay between formal charge and trial was purposeful, arbitrary, oppressive or vexatious. *Smith* v. *United States*, *supra*; *Nickens* v. *United States*, 116 U.S. App. D.C. 338, 323 F.2d 808 (1963); *King* v. *United States*, *supra*; *Williams* v. *United States*, 102 U.S. App. D.C. 51, 250 F.2d 19 (1957). See *Taylor* v. *United States*, 99 U.S. App. D.C. 183, 238 F.2d 259 (1956). It must be noted further that the right has been held to be waived unless promptly exercised, as by pre-trial motion to dismiss the indictment. *United States* v. *Lustman*, 258 F.2d 475, 478 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958). Especially when the District Court may be required

to conduct a hearing and initially to rule on an issue which must be evaluated in the circumstances of the particular case, orderly procedure dictates that the motion be timely made in the trial court to be preserved for appeal. See *Ross* v. *United States*, No. 17,877, *remanded by order*, January 28, 1964; *cf. Jackson (Henry)* v. *United States*, No. 18,225, decided August 7, 1964.

It is submitted that on its face, the claim is without merit. *Cf. Hardy & Ferguson* v. *United States*, Nos. 18,079, 18,148, decided August 20, 1964. Failure of recollection of a defendant in a criminal case in four months cannot conceivably predicate dismissal of an indictment. That a defendant claims not to recall after two months what preceded his arrest for an immediately-specified offense can hardly immunize him. To recite the facts of the matter is to expose the claim as frivolous.

No mention of speedy trial was made in the trial court, despite the assignment judge's specific admonition that the motion be asserted there[1] (Supp. Tr. II, 2). Particularly in view of recent cases approving a docket-conserving method of resolving a speedy trial motion in the course of the trial, failure even to mention the matter in the trial court should preclude appellate review. See *Deans* v. *United States*, No. 18,417, *aff'd by order*, July 6, 1964; compare *Harvey* v. *United States*, No. 17,852,

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[1] Appellant Pannell did not join in the motion at any time. The particularized circumstances of age and education relied upon by appellant Shelton in his motion dictate effective joinder to require at least proffer of a similarity of circumstances, which has been attempted conclusionarily only in appellant's brief (Br. 20). Even the factual basis on which Shelton's motion rests is problematical, to say the least. At the heart of the matter is a protest that sixty days in jail in the District of Columbia without counsel cost him recollection of places and potential witnesses essential to his defense. Shelton himself swore not the fact; his counsel attested the conclusion. But Shelton's defense at trial was—in part—an attempt to show that due to intoxication the night of his arrest he could not form a specific intent requisite to housebreaking (Tr. 148-149). Inability to recall what happened would seem equally chargeable to his imbibing as to his incarceration, taking Shelton at his word (Tr. 96-112, 114-117).

aff'd by order, October 4, 1963, with *Ross* v. *United States*, *supra*.

The case is hardly appropriate for application of F. R. Crim. P. 52(b). Even assuming *arguendo* the asserted fact of Shelton's faulty recall, and assuming further that it is chargeable to the processes of bringing him to court, no prejudice to his rights is shown. Unlike *Taylor* v. *United States*, *supra*, on which they rely, appellants were not completely cut off from the outside world. While in the District of Columbia Jail they not only had access to family and friends, but the docket in the District Court shows they had a friend on the street with a vested interest in the case—co-defendant Haynes (released on bond on November 16, 1963). Haynes had been with the group which assembled at the beauty parlor, toured the pool hall and stopped off at the coffee shop en route to the laundry (Tr. 133, 135).

It cannot be disputed that during the lapse of time in jail, appellants knew full well the charge against them and the asserted circumstances. They had been caught in the very act from which the charge arose; they had heard the complaint read them by the Commissioner soon thereafter; they had heard one of the police officers testify to the probable cause required to hold them; and the Commissioner's record shows that the defense offered at trial—that no harm was intended in entering the building—was offered at the Commissioners. Compare *Nickens* v. *United States*, *supra*, and *Deans* v. *United States*, *supra*, *held*, no deprivation of rights where the accused was not arrested for (much less confronted with) his crime until many months after its commission). If all this did not serve to stem the ebb of their recollection, the mental inadequacy involved is the stuff of a motion for mental examination to determine competency to stand trial, not a motion to dismiss for want of expedition in the proceedings.

However, despite Shelton's lack of knowledge of his whereabouts prior to the break-in, his faculties apparently served him well upon the stand; he detailed accurately

where he had been and what had occurred as he went (Tr. 96-112, 114-117). Moreover, he did not lack witnesses to his drunken condition: the friend who unsuccessfully tried to get him home about four hours before the housebreaking testified that Shelton had passed out from drink; the aforementioned co-defendant Haynes—who had plenty of opportunity to observe him—was available though he did not mention Shelton's condition (and was not asked it) (Tr. 117-123, 132-136). There is nothing in the record to suggest that Pannell and Haynes enjoyed the same troubled memory as Shelton, so that *all* possibility of finding additional witnesses was exhausted.

In short, appellants fail to raise a colorable claim of hardship, much less trial prejudice amounting to a deprivation of their rights which would warrant dismissal of the indictment.[2] Compare *Marshall* v. *United States*, No. 18047, decided June 30, 1964.

II. Appellants were deprived of none of their rights at their presentment to the Commissioner.

Failure of the Commissioner to appoint them counsel at their presentment the same morning of their arrest is urged to have deprived appellants of an "absolute right" to counsel at "a critical stage of the proceedings against them." (Br. 32-33, 51-52.) Violation of this right, assertedly assured by the Fifth and Sixth Amendments, apparently is viewed by appellants as a proper predicate simply to dismiss the indictment. As with their speedy

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[2] Similarly, effective assistance of counsel cannot be regarded as denied by the pre-arraignment period as appellants urge (Br. 16-31); the record of a trial in which counsel secured an acquittal on one count and fully presented a jury issue on a complete defense to the other does not reveal the trial a "farce and mockery of justice" which is the standard by which counsel's effectiveness is measured. See *Mitchell* v. *United States*, 104 U.S. App. D.C. 57, 63, 259 F.2d 787, 793, *cert. denied*, 358 U.S. 850 (1958). The object of, and consequent obligation upon, counsel is "to secure a fair trial, not to see that his client is acquitted regardless of the merits." *Id.* at 62, 259 F.2d at 792.

trial contention, however, their appeal to lofty constitutional principles—and their hopes—ride in an inadequate factual vessel beset by incurable procedural infirmities. For each of the succeeding reasons set forth below—each in turn dispositive—the claims cannot warrant reversal.

First, their lack of counsel before the Commissioner at no time—and in no guise—was raised below; no relief was sought on that score; and in view of the fact that concededly the Commissioner did exactly what F. R. Crim. P. Rule 5(b) required him to do, plain error predicating this Court's review cannot be shown. *Moon* v. *United States*, 115 U.S. App. D.C. 133, 317 F.2d 544 (1962), *cert. denied*, 375 U.S. 884 (1963).

Second, Sixth Amendment rights are not infringed by lack of counsel at preliminary hearing.[3] *Jackson (John)* v. *United States*, No. 17,746, decided August 13, 1964 (and cases at fn. 2). Appellants' claim to Fifth Amendment due process deprivations is ineffectual, for appellants entered no plea at the Commissioner's nor could they have done so: in the District of Columbia, presentment is not *per se* a critical stage of the proceedings.[4] Compare *White* v. *Maryland*, 373 U.S. 59 (1963). They cannot show prejudice accruing at that stage which "fatally infected their trial with unfairness": nothing—no statements, confessions, admissions or any proof whatsoever—

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[3] The Commissioner has no authority—and 2 D.D.C. § 2202 gives him no authority—to *assign* non-paid counsel to represent indigents at his own hearings. This is clear from the face of F.R. Crim. P. 44, from note 2 of the committee's notes on the rule, and from *proposed* Rules 5(b) and 44 cited by appellants (Br. 8). Much less does he have power to assign a case to counsel for appearances in the District Court, which would be necessary to insure assistance of counsel for the period here urged as prejudicial by appellants.

[4] Even had they tried to enter a plea, it would have been considered a waiver of the hearing, and would be inadmissible. *Wood* v. *United States*, 75 U.S. App. D.C. 274, 128 F.2d 265 (1942). But damaging admissions made at a Commissioner's hearing are not inadmissible simply because no lawyer was present. *Saunders* v. *United States*, 114 U.S. App. D.C. 345, 316 F.2d 346 (1963); *Nance* v. *United States*, 112 U.S. App. D.C. 38, 299 F.2d 122 (1962).

therefrom was used against them at trial. See *Lisenba* v. *California*, 314 U.S. 219 (1941). Since the sole purpose of the preliminary hearing is to determine whether there is probable cause to detain an accused pending grand jury action, indictment by the grand jury clearly cures any defects which relate to that proceeding.[5] *Barber* v. *United States*, 142 F.2d 805, 807 (4th Cir.), *cert. denied*, 322 U.S. 741 (1944); *cf. Washington* v. *Clemmer*, No. 18,602, decided May 11, 1964. Of course, a due process claim is dependent upon an affirmative showing that unfairness spoiled the trial which—as noted *supra* in part I—was never undertaken below and cannot here be done. *United States ex rel. Von Cseh* v. *Fay*, 313 F.2d 620 (2d Cir. 1963).

Third, appellants cite no case where denial of counsel at presentment or arraignment[6] has dictated dismissal of the indictment in a criminal case. The cases where absense of counsel is one factor in assessing prejudice from lack of a speedy trial simply cannot carry his point. *I.e.*, *Taylor* v. *United States*, *supra*. The cases principally relied on to demonstrate the "spirit with which the Supreme Court treats with [this] problem" are cases announcing a rule of evidence requiring suppression of a confession or admission which has been obtained in violation of the confessor's rights to counsel (Br. 23). *I.e.*, *Escobedo* v. *Illinois*, 378 U.S. 478 (1964); *Massiah* v. *United States*, 377 U.S. 201 (1964); *Ricks* v. *United States*, —— U.S. App. D.C. ——, 334 F.2d 964 (1964). A rule which would require dismissal where a defendant

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[5] Thus, such questions relating to the Commissioner's proceedings are properly raised by habeas corpus prior to indictment. See *Washington* v. *Clemmer*, *supra*.

[6] Where an unrepresented defendant enters a plea of not guilty at arraignment, his fundamental rights are not abridged. *Council* v. *Clemmer*, 85 U.S. App. D.C. 74, 177 F.2d 22, *cert. denied*, 338 U.S. 880 (1949). Of course, appellants again are unable to show trial prejudice from counsel's absence; the fact that counsel at no time between arraignment and trial sought to avail his client of his advocacy on the matter of bond precludes the notion the original denial of reduction was not appropriate.

was not offered counsel at a non-critical preliminary stage of the proceedings where counsel is not required and where no prejudice occurs would indeed be spirited. But the Supreme Court has neither gone this far nor suggested it would do so. Appellants do not—and cannot—seriously contend that constitutional rights of an indigent to appointed counsel are not more than adequately protected by the explicit right to a speedy trial and implicit evidentiary rule of *Escobedo* and *Massiah*, *supra*.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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REPLY BRIEF FOR APPELLANTS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOS. 18793, 18794

NATHANIEL E. SHELTON AND ROBERT B. PANNELL

Appellants

v.

UNITED STATES OF AMERICA

Appellee

Appeal from a judgment of the
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAMUEL K. ABRAMS

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Washington, D.C.

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ARGUMENT

I

THESE APPELLANTS, INDIGENT AND IN JAIL, WERE DEPRIVED OF THEIR SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNTIL 61 DAYS AFTER THEIR ARREST.

The Government undertakes in large measure to dispose of this appeal as though it were simply one in which there was a four-month lapse of time between arrest and trial and in which "no trial prejudice" was shown. In so doing, it seeks to eliminate from any meaningful consideration the central point made by this appeal: That these indigent appellants were deprived of their unqualified right to the assistance of counsel in their defense until 61 days after their arrest, all of which time they were in jail.[1/]

The Government urges that no prejudice arose from the delay in appointing counsel. Appellants' position is that these accused suffered serious prejudice when they were denied the opportunity to consult with counsel and to have their assistance for two months after their arrest, and that in any event such deprivation of the assistance of counsel "is too fundamental and absolute to allow courts

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1/ The purpose of the Government is made plain by the fact that, in stating the "CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED" (Br.6), it sets forth only so much of the Sixth Amendment to the United States Constitution as refers to "the right to a speedy and public trial" and omits entirely that part of the Sixth Amendment which provides that in all criminal prosecutions "the accused shall enjoy the right. . . to have the Assistance of Counsel for his defence."

to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, 315 U.S. 60, 76, 62 S.Ct. 457, 467 (1942).

The affidavit of court-appointed counsel in support of the Motion for Discharge of Defendant Nathaniel E. Shelton and For Dismissal of Indictment for Want of a Speedy Trial (Rec.) sets forth that, by reason of the delay in the appointment of counsel, accused had difficulty in recalling for them facts which took place at the time of the alleged crimes and in recalling the description of possible witnesses; that certain witnesses could not then be found; and that other persons could no longer recall the events that took place at the time of the alleged crimes (Rec.). None of these facts were controverted by the Government in the lower court.

The casual approach of the Government to the Constitutional rights of appellants is made evident by the statement in its brief that: "While in the District of Columbia jail they not only had access to family and friends, but they had a friend on the street with a vested interest in the case -- co-defendant Haynes (released on bond on November 16, 1963) " (Br. 9). Appellants would not regard the "access to family and friends" made available to an

indigent prisoner in the District of Columbia Jail as a substitute for the effective assistance of counsel. Nor would they consider that "a friend on the street" in the person of a co-defendant would serve the same purpose as the assistance of counsel. (In this case, the co-defendant (Haynes) whose possible help the Government equates with "effective assistance of counsel" was a 17 year old, released from jail 55 days after appellants' arrest.)

It is difficult to square the position of those here representing the Government with reference to the harm visited upon these appellants with that of the Attorney General in dealing with the problem of holding in jail accused persons who cannot raise bail. In an address to the Academy of Trial Lawyers of Allegheny County, Pennsylvania, on June 1, 1964, Attorney General Robert F. Kennedy said:

> "And remaining in jail may have substantial effect on any defendant's ability to make a proper defense. He is severely restricted in the contribution he can make to the pretrial investigation and in conferences with his attorney."

These appellants were, of course, much more disadvantaged than those accused described by the Attorney General. Appellants here not only were in jail but for 61 days had no attorneys with whom they could confer.

II

THE MOTION TO DISMISS THE INDICTMENT, WHICH SET FORTH FACTS WITH RESPECT TO THE DELAY, WAS RULED UPON BY THE LOWER COURT.

Contrary to the Government's assertion (Br. 8), the motion setting forth the prejudice to appellants and seeking dismissal of the indictment was presented to and disposed of by the lower court.

When the motion came on for hearing before Chief Judge McGuire of the District Court on January 20, 1964, the following colloquy took place (Supp. Tr. II, 2-3):

"MR. ABRAMS: We have undisposed of a motion for dismissal --

"THE COURT: For lack of a speedy trial -- take that up before Judge Holtzoff. You are getting a speedy trial.

"Who filed this motion?

"MR. ABRAMS: The indictment was returned on November 18 but the point arises out of the fact he was arrested on September 22nd and the indictment was not returned and filed until November 18, 1963.

"THE COURT: That is denied. That is one of the peripheral areas the Court of Appeals has not yet decided.

"MR. PARTRIDGE: Does Your Honor formally deny that motion?

"THE COURT: I formally deny it.

"MR. PARTRIDGE: Then that would apply to my client and he also filed a motion to dismiss, --

"THE COURT: Yes. . . ."

While Judge McGuire originally instructed counsel to take up the motion before Judge Holtzoff, he thereafter disposed of the motion himself. Following Judge McGuire's denial of appellant Shelton's motion, counsel for appellant Pannell (Mr. Partridge) asked Judge McGuire if denial of this motion would apply to Pannell. Judge McGuire replied "Yes." The motion was thus ruled upon by Judge McGuire with respect to both appellants, Shelton and Pannell.

III

THE ISSUE OF APPELLANTS' RIGHT TO COUNSEL AT PRELIMINARY HEARING AND AT ARRAIGNMENT IS PROPERLY BEFORE THIS COURT.

There is no merit in the Government's contention that appellants have lost their Constitutional right to "effective assistance of counsel" at the preliminary hearing and at arraignment because of the asserted failure to raise these objections below.[2/]

2/ Appellant Shelton's motion to dismiss the indictment (Rec.), in which Pannell joined, set forth pertinent facts as to the time of the appointment of Shelton's counsel in relation to the preliminary hearing and the arraignment. The record before the lower court fully reflected that neither appellant had counsel at preliminary hearing or at arraignment.

In assessing the Government's argument that appellants have lost their right to object to the failure to afford them counsel at preliminary hearing and at arraignment, it will be useful to review Hamilton v. State of Alabama, 368 U.S. 52, 82 S. Ct. 157 (1961), and White v. State of Maryland, 373 U.S. 59, 83 S. Ct. 1050 (1963). Both decisions make it perfectly clear that the right to appellate review of these issues is not dependent upon whether the points were raised below.

In Hamilton, the United States Supreme Court held that under Alabama law arraignment is a critical stage in a criminal proceeding and that denial of counsel at arraignment required reversal of the conviction without regard to prejudice. The Supreme Court of Alabama had denied relief because there was no showing nor attempt to show that petitioner was "disadvantaged in any way by the absence of counsel when he interposed his plea of not guilty." Ex parte Hamilton, 271 Ala. 88, 122 So. 2d 602, 607 (1960).

The Alabama Supreme Court pointed out that Hamilton was arraigned without counsel on March 1, 1957, and pleaded not guilty. A lawyer was appointed to represent defendant on March 4, 1957. The court stated that the competence of that lawyer "is not questioned" and that that lawyer "asserts

in an affidavit filed in this proceeding that he would not have entered any different plea than the plea that was entered by the defendant on March 1, 1957." 122 S. 2d at 607.

In reaching its decision, the Alabama Court relied upon Council v. Clemmer, 85 U.S. App. D.C. 74, 177 F. 2d 22 (1949), saying:

> "In a number of Federal Cases where the defendants were entitled to the benefit of counsel, it has been held that there was no abridgment of the right to counsel where the defendant was arraigned before counsel was appointed to represent him and the defendant pleaded not guilty. Even where the defendants pleaded guilty on arraignment the failure to appoint counsel has been said not to have been prejudicial where counsel was appointed immediately after arraignment and full opportunity was given to withdraw the plea or to take whatever steps were necessary or desirable without regard to what previously transpired. Council v. Clemmer, 85 U.S. App. D.C. 74, 177 F. 2d 22, and cases cited; Young v. United States, 8 Cir., 228 F. 2d 693." 122 So. 2d at 604.

Less than two years after its decision in Hamilton v. Alabama, supra, the United States Supreme Court held in White v. State of Maryland, supra, that failure in Maryland to afford counsel to the defendant at his preliminary hearing required reversal of a murder conviction, holding that this result was governed by the Hamilton case. In its opinion, the Supreme Court pointed out that the plea of guilty entered at the preliminary hearing by White was

introduced in evidence at his trial and added this footnote: "Although petitioner did not object to the introduction of this evidence at the trial (227 Md., at 619-620, 177 A. 2d, at 879), the rationale of Hamilton v. Alabama, supra, does not rest, as we shall see, on a showing of prejudice." 373 U.S. at 60, 83 S. Ct. at 1051. (Emphasis supplied.)

In the light of the Supreme Court's analysis in Hamilton and White, it is clear that protection of appellants' Constitutional right to counsel at the preliminary hearing and at arraignment cannot be made to depend upon whether objection to lack of counsel at those proceedings was raised by subsequently-appointed counsel in the trial court.[3/]

IV

THESE APPELLANTS WERE PREJUDICED BY LACK OF COUNSEL AT PRELIMINARY HEARING.

The Government's brief states that at the preliminary hearing "defendants then presented testimonial matter to the effect that some other persons were already in the building, and appellants had entered only on their invitation"

3/ The one-sidedness of the contest when youthful defendants must proceed in their own behalf during preliminary hearing and arraignment, and when the Government is represented by an Assistant United States Attorney is exemplified in this case by the exchange which took place at arraignment during the hearing on appellant Shelton's pro se Motion for Reduction of Bond, denied by Judge McLaughlin (Supp. Tr. I., pp. 4-6).

(Br. 2). The record on appeal does not include any such facts, and appellants presume that Government counsel base this statement on conclusions drawn from their examination of notes taken by the Commissioner at the preliminary hearing and retained in the Commissioner's possession.[4/]

The harm done to appellants by reason of their lack of counsel at the preliminary hearing is manifest. This is true whether, as the Government asserts, the appellants themselves affirmatively offered this evidence or whether this evidence was offered by a Government witness, as appellants believe on the basis of counsel's examination of the Commissioner's notes after they received the Government's brief. Had counsel been present at the preliminary hearing and heard testimony that other persons were already in the building and that appellants entered

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4/ The prejudice imposed upon an accused when, as in this case, no stenographic transcript is made of the preliminary hearing and the record consists of such of his notes as the Commissioner incorporates into the record is discussed in Johnson & Stewart v. United States of America, ___ U. S. App. D.C. ___, ___ F. 2d ___ (Nos. 18,243, 18,244, September 25, 1964) (Slip opinion). The present case represents an aggravated example of the necessity for a transcript rather than that reliance be placed upon the extracts of the evidence which the Commissioner chooses to place in the record.

the building at the invitation of those persons,[5] then counsel would have been in a position to seek to locate those persons on the day following appellants' arrest rather than, as resulted by reason of their delayed appointment, two months later.

In Washington v. Clemmer, ___ U.S. App. D.C.___, ___F. 2d___, (No. 18,602, May 11, 1964) (slip opinion),[6] this Court held that defendant was entitled to have present at the preliminary hearing a stenographic reporter furnished by the United States District Court or the United States Attorney or the committing magistrate, saying (slip opinion at 3-4):

> ". . .The preliminary hearing is an adversary judicial proceeding necessary to authorize continued constraint of the accused. [Citations omitted.] Absence of a transcript makes it difficult, if not impossible, to review the Commissioner's finding of

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5/ A defense offered by appellants was that they did not enter the laundry for the purpose of committing a crime. If they could have made out that defense, they could not have been guilty of the crime with which they were charged, Housebreaking, D.C. Code §22-1801, Edwards v. United States, 84 U.S.App.D.C.310, 172 F. 2d 884 (1949), but at most would have been guilty of the offense of Unlawful Entry, D.C. Code §22-3102, and the trial court so instructed (Tr. 162-63). Appellants were acquitted of the second count in the indictment, Destruction of Movable Property, (a charge based on damage done to the safe in the laundry) D.C. Code §22-403, which strongly suggests that if appellants had been able to offer additional evidence that they did not enter the laundry to commit a crime they would have been acquitted.

6/ Appellants' brief in chief stated (p.38) that in Washington v. Clemmer this Court reversed the conviction. In fact, the ruling was in habeas corpus proceedings.

> probable cause. And verbatim recording of testimony at an early state of the process perpetuates the fresh memory of witnesses, making it available in case of subsequent death, disability, or flight, and allowing impeachment or refreshing of recollection at trial. Accordingly, early recording also serves to discourage threats against witnesses and suborning of perjury.
>
> "And even if the absence of a transcript might ultimately be found not prejudicial, obviously it is not possible to predict such an eventuality, and the Commissioner should therefore ordinarily grant a request for a reporter.
>
> "We think these reasons justify the exercise of our supervisory power over the administration of criminal justice in the District of Columbia to require stenographic recording of testimony at the preliminary hearing."

The rationale of Washington v. Clemmer is particularly applicable to this case. It was critical to the defense of these appellants that they perpetuate "the fresh memory of witnesses." Their plight was more serious than that in Washington, where defendant had the benefit of counsel at his preliminary hearing. Washington's counsel not only was in the position to hear the testimony but as a lawyer he recognized the need for "verbatim recording of testimony at an early stage of the proceedings." These appellants had no counsel at the preliminary hearing nor were they to have counsel until 60 days after the preliminary hearing. The Court's ruling that Washington, represented by counsel at the preliminary hearing, was entitled to a

stenographic transcript of the preliminary hearing would seem to make absolutely certain that these appellants were entitled at an irreducible minimum to have counsel present at a preliminary hearing at which there was offered evidence vital to the preparation of their defense on the merits.[7/]

V.

APPELLANTS WERE DENIED A SPEEDY TRIAL BECAUSE THE DELAY BETWEEN ARREST AND INDICTMENT AND THE ATTENDANT FAILURE TO AFFORD COUNSEL WERE FATAL TO THEIR DEFENSE.

The Government contends that a claim of lack of a speedy trial predicated on a four-month[8/] delay between arrest and trial is frivolous. Appellants' position is

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7/ In Washington v. Clemmer, supra, this Court also ordered that "reasonable requests for subpoenas be granted in compliance with Rule 5(c) and Rule 17 of the Federal Rules of Criminal Procedure" (slip op. at 9). In the light of the evidence presented at the preliminary hearing reflecting that appellants did not enter the laundry to commit a felony, if appellants had counsel at the preliminary hearing such counsel might have been able to bring in witnesses whose testimony would have resulted in a finding of lack of probable cause, in which case appellants would have gained their freedom. As the Court indicated, it is not possible to predict the eventuality when basic rights are denied to an accused.

8/ Judge Wright in his dissent in Smith v. United States, ___U.S. App. D.C. ___, 331 F. 2d 784, 793 (1964) remarked:

"The Government argues that, considering calendar congestion and related evils, six months really is not an unreasonable time to spend in jail awaiting trial. That appraisal, of course, depends on whose time is being spent."

that the aggregate time lapse between arrest and trial is not in and of itself the dispositive factor in a speedy trial issue. It is the nature of the delay and the combination of other factors which are decisive. Taylor v. United States, 99 U.S. App. D.C. 183, 238 F. 2d 259 (1956).

The Government cites King v. United States, 105 U.S. App. D.C. 193, 265 F. 2d 567 (1959), cert. denied, 359 U.S. 998 (1959), Smith v. United States, supra, and Nickens v. United States, 116 U.S. App. D.C. 338, 323 F. 2d 808 (1963), in support of its position.

In Smith and King, this Court was concerned with the delay between indictment and trial and considered such factors as the court calendar system and whether delay was attributable to the prosecution or to the defense. In Nickens, this Court was confronted with a delay between the offense and formal charge, which it characterized as a statute of limitations question rather than a question involving the Sixth Amendment right to a speedy trial, (although in so holding Judge Burger said: "[t]his is not to suggest that delay between offense and prosecution could not be so oppressive as to constitute a denial of due process." [Citations omitted].)[8a/] The crucial facts

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8a/ 323 F.2d at 810 n.2.

distinguishing this case from Nickens are that Nickens was not imprisoned before his indictment and the issue of right to counsel was not an ingredient of his speedy trial claim.

In Williams v. United States, 102 U. S. App. D.C. 51, 250 F. 2d 19 (1957), this Court held that, where defendant raises a speedy trial claim and asserts that there has been an unreasonable delay, the Government must show "there was no more delay than is reasonably attributable to the ordinary process of justice and . . .that the accused suffered no serious prejudice beyond that which ensued from the ordinary and inevitable delay." Id. 250 F.2d at 21.

In this case, the Government has failed to assert and the record does not imply a single reason justifying the delay of two months between the arrest and arraignment and between arrest and appointment of counsel.

VI

ON THE FACTS PRESENTED BY THIS APPEAL, THE CASES RELIED UPON BY THE GOVERNMENT DO NOT SUPPORT ITS CONTENTIONS.

The Government has cited Moon v. United States, 115 U.S. App. D.C. 133, 317 F.2d 544 (1963) to support its contention that appellants did not raise below the issue of their right to counsel in proceedings before the Commissioner and that they therefore cannot now raise this issue. Moon

was in jail serving a sentence for another offense when he appeared before the Commissioner on a complaint charging robbery. At his first appearance before the Commissioner, Moon requested that his preliminary hearing be continued for four weeks to permit him to obtain counsel. After his first appearance before the Commissioner, but prior to his preliminary hearing, Moon confessed to a police officer that he had committed the robbery. At his trial the police officer testified to Moon's confession and no objection was made to its admission into evidence. In contrast, appellants Shelton and Pannell were not in jail prior to their arrest and it was the proceedings before the Commissioner, held without affording them counsel, which deprived appellants of their freedom and set in motion the prejudicial facts and circumstances upon which this appeal is based.

Appellants have further made the point that, during their first appearance before the Commissioner, the Commissioner failed to inquire as to whether they were indigent and did not advise them of their right to have counsel assigned (App. Br. 32). In Moon the Court found that during Moon's first appearance before the Commissioner, he was advised of his rights pursuant to Fed. R. Crim. P. 5(b), including the right to retain counsel, and the court

held that this was: "exactly what Rule 5(b) required . . . [the Commissioner] to do, we cannot say that there was 'plain error' under Fed. R. Crim. P. 52(b)." It is important to note that Moon was decided before the Supreme Court's decisions in White v. Maryland, supra, decided April 29, 1963, and Escobedo v. Illinois, __U. S.__, 84 S. Ct. 1758, decided June 22, 1964, and this Court's decision in Ricks v. United States, __U.S.App.D.C.__, 334 F.2d 964, decided June 9, 1964. Under the rationale of these cases, Fed. R. Crim. P. 5(b), which requires that the Commissioner advise the accused of his right to retain counsel and does not require him to advise an indigent accused of his right to have appointed counsel, no longer conforms to Constitutional standards with respect to the effective assistance of counsel. Nor on the facts in this case could it be asserted that the denial of counsel to appellants at preliminary hearing was not a "plain error[s] or defect[s] affecting substantial rights" within the purview of Fed. R. Crim. P. 52(b). Tatum v. United States, 88 U. S. App. D.C. 386, 190 F.2d 612 (1951); Green v. United States, 113 U.S. App. D. C. 348, 308 F. 2d 303 (1962); Contee v. United States, 94 U. S. App. D.C. 297, 215 F.2d 324 (1954).

The Government in asserting that "Sixth Amendment rights are not infringed by lack of counsel at preliminary

hearing . . . ." (Br. 11) relies on Jackson (John) v. United States (No. 17,746, August 13, 1964) (Slip opinion). The Jackson case is distinguishable from this case in the vital respect that the Commissioner told Jackson that "he could have an attorney if he so desired."[9/]

The Government further contends that "a due process claim is dependent upon an affirmative showing that unfairness spoiled the trial" and that a claim based on those grounds was never undertaken below and cannot here be done, citing United States ex rel Von Cseh v. Fay, 313 F.2d 620 (2nd Cir. 1963) (Br.12). In the Von Cseh case, the court ruled that the due process clause of the Fourteenth Amendment does not make the speedy trial provision of the Sixth Amendment directly applicable to state action. In its decision, the court stated:

> "[F]our facts are relevant to a consideration of whether denial of a speedy trial assumes due process proportions: the length of delay, the reason for the delay, the prejudice to defendant and waiver by the defendant. See Note 57 Colum. L Rev. 846, 861-63 (1957). These factors are to be considered together because they are interrelated. Even a short delay might constitute a violation of the defendant's constitutional right where the defendant is held without bail, and there is no reason for the delay." United States ex rel Von Cseh v. Fay, supra, at 623. (Emphasis supplied.)

9/ Jackson (John) v. United States, supra, slip op. at 3.

Since this appeal is in the Federal courts, the due process clause of the Fifth Amendment does apply to speedy trial. Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693 (1954). Moreover, the facts in this case fully meet the factual situation which the Court in Von Cseh indicated would constitute a violation of constitutional rights: appellants were held without bail and there was no reason for the delay.

The Government relies upon United States ex rel Von Cseh v. Fay, supra, United States v. Lustman, 258 F.2d 475 (2d Cir.1958), and Taylor v. United States, 99 U.S. App. 183, 238 F.2d 259 (1956) for the proposition that the right to speedy trial "has been held to be waived unless promptly exercised as by pre-trial motion to dismiss the indictment" (Br.7).[10]

The Lustman, Von Cseh and Taylor cases do not support the Government's position but instead stand for the general rule that in the Federal courts "the right to a speedy trial is the defendant's personal right and is deemed waived if not promptly raised."[11] In those cases, the

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10/ The fact is, of course, that appellants did make such a pre-trial motion. See pages 4-5, supra.

11/ United States v. Lustman, supra, 258 F.2d at 478.

reasoning is that where an accused is represented by counsel and there is delay in bringing the case to trial the accused, if he objects to the delay, must demand a speedy trial, because delay may be to his advantage. Where that is so, he will not be permitted to stand by and later assert that he has been denied a speedy trial. These cases recognize the exception to this general rule where the "defendant because of imprisonment, ignorance, or lack of legal advice was not in a position to claim his right."[12/] "[I]mprisonment, ignorance . . .[and] lack of legal advice" in all respects describe the situation confronting these appellants before counsel were made available to them.

Respectfully submitted,

/s/ Samuel K. Abrams
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/s/ Bernard M. Beerman
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12/ Ibid.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief for Appellants has been hand-delivered to the attorney for appellee: The United States Attorney at the United States Courthouse, Constitution Avenue and John Marshall Place, Washington, D.C., this 23rd day of October, 1964.

/s/ Bernard M. Beerman
BERNARD M. BEERMAN

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UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

Nathaniel E. Shelton
Robert B. Pannell

Appellants

v.

United States of America

Appellee

Nos. 18,~~795~~ 18,794

PETITION FOR REHEARING EN BANC

Appellants in the above-entitled cause do now respectfully request and petition this Court for a rehearing en banc because of the importance of the Constitutional questions involved.

Appellants' convictions in the District Court of the crime of housebreaking (22 D.C. Code §1801) was affirmed by a judgment of this Court on February 11, 1965.

I

The decision of this Court did not consider the following issue upon which appeallants primarily relied: That these youthful appellants, without funds to retain counsel or post bail, were deprived of their Constitutional right to the effective assistance of counsel because they were not afforded counsel until 61 days after their arrest, which period included their preliminary hearing and arraignment.

In this case, witnesses disappeared and leads grew stale because nearly two months elapsed before these imprisoned appellants were afforded counsel. Appellants' position is that an accused requires the advice and guiding hand of counsel throughout all of the critical stages in the criminal proceedings against him and that assistance of counsel is required in the preparation of the defense before trial, as well as during the trial itself.

The prejudice imposed upon these appellants, without counsel and unable to undertake the investigation of facts and to interview witnesses in the first crucial weeks after arrest, is no less great than that which is imposed upon an uncounseled accused person from whom a confession has been elicited in the early stages of the proceedings against him and subsequently admitted into evidence at his trial. In the one instance, the defendant is disabled from presenting evidence which is essential to his defense; in the other, improperly gathered evidence is presented against him. The harm and the result are the same.

In this case, the prejudice to appellants was not theoretical. It was demonstrated clearly by the uncontroverted affidavit of one of the appellant's

appointed trial counsel in support of a pre-trial motion to dismiss the indictment.

Counsel's affidavit set forth that appellant Shelton gave counsel the names of persons who were probable witnesses in his behalf, that by the time counsel were made available (two months after arrest) two of those witnesses could no longer be found, and other persons interviewed by counsel could no longer remember the events of the night of the alleged crime.

As noted by this Court in Blue v. United States, ___ U.S. App. D.C. ___, ___ F. 2d ___ (No. 18,401, October 29, 1964)(slip opinion, at 10-11), "criminal prosecution is a continuous and unitary process, and . . . each stage along the way has its own intrinsic importance as well as a frequently significant relationship to the final result." In these proceedings, denial for a long period of time of the assistance of counsel in gathering evidence and in interviewing witnesses was of the greatest significance. Appellants were indicted on two counts, the first, housebreaking, and the second, the destruction of movable property (22 D.C. Code §403). The jury found appellants not guilty of the second count, which related to damage done to a safe which was on the premises where the alleged housebreaking occurred. At trial the Government

introduced evidence that the safe had been damaged and that safecracking tools were found near the safe. One of appellants' defenses to both counts of the indictment was that other persons had preceded them into the building and, while still on the premises, invited appellants to enter the building, and that appellants did not enter the building for the purpose of committing a crime. Had this defense prevailed, appellants would not have been guilty of housebreaking but at most of the offense of unlawful entry (22 D.C. Code §3102). Their acquittal on the charge of destroying movable property strongly suggests, that if counsel had been promptly made available to these indigents, counsel immediately could have undertaken to locate those other persons and to obtain evidence which would have negatived the specific intent to commit a crime required on a charge of housebreaking.

II

The decision of the Court did not consider two other Constitutional points raised by appellants.

(1) Appellants, imprisoned because they were unable to post a bail bond, were denied their Constitutional right to a speedy trial because of the lapse of time between their arrest and the filing of the indictment against them (55 days), with the accompanying delay in

the appointment of counsel (61 days after arrest).

Appellants' position is that the aggregate time lapse between arrest and trial is not in and of itself the dispositive factor in a "speedy trial" case. The Government failed to assert and the record does not reflect a single fact in justification of the delay. The prejudice worked upon appellants during this period in the preparation of their defense was of such a nature that the accused could no longer "enjoy the right to a speedy and public trial" no matter how expeditiously such trial should thereafter be arranged.

(2) Whether an accused pleads guilty or not guilty, the arraignment is a critical stage in criminal proceedings against him and the right to counsel in such proceedings is absolute.

In Federal criminal procedure, the arraignment is a sine qua non to the trial itself where the accused is informed of the indictment and pleads to it, thereby formulating the issues to be tried.

III

This Court decided adversely to appellants on the one Constitutional issue which it discussed in its decision, namely, that the mandate of the Sixth Amendment which requires the assistance of counsel at every critical

stage of the criminal proceeding against an accused was, in the circumstances of this case, violated by the failure to afford counsel to appellants at their preliminary hearing and by the failure of the United States Commissioner to advise appellants of the availability of counsel.

In ruling adversely to appellants, this Court stated that the absence of the assistance and advice of counsel at the preliminary hearing "does not necessarily invalidate a subsequent conviction at trial after indictment, " citing Blue v. United States, supra.. The Court said that in Blue it had held that an accused has other remedies to enforce his right to counsel at his preliminary hearing.

In Blue, this Court made it absolutely clear that a defendant is entitled to counsel at his preliminary hearing, and that that right persists whether or not the defendant affirmatively requests a lawyer. In sustaining the conviction in Blue, the Court found that lack of a preliminary hearing did not so handicap appellant in his first trial as to require a second. Therein, Blue is in all respects distinguishable from the present case. Here, the lack of counsel at the preliminary hearing so infected the proceedings that no later preliminary hearing

could cure this defect; in the 61 days before appointment of counsel, witnesses disappeared and the memories of others dimmed.

The Government's brief on appeal in this cause states that at the preliminary hearing "defendants then presented testimonial matter to the effect that some other persons were already in the building, and appellants had entered only on their invitation" (Br. 2).[1/] The harm done to appellants by reason of their lack of counsel at the preliminary hearing is thus made manifest. This is true whether, as the Government asserts, the appellants themselves affirmatively offered this evidence or whether this evidence was offered by a Government witness (as appellants believe on the basis of counsel's examination of the Commissioner's notes after they received the Government's brief). Had counsel been present at the preliminary hearing and heard testimony that other persons were already in the building and that appellants entered the building at the invitation of those persons, then counsel would have been in a position to seek to locate

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1/ As noted in appellants' Reply Brief (p. 9), the record on appeal does not include any such facts, and appellants presume that Government counsel base this statement on conclusions drawn from their examination of notes taken by the Commissioner at the preliminary hearing and retained in the Commissioner's possession.

those persons on the day following appellants' arrest rather than, as resulted by reason of their delayed appointment, two months later. Thus, unlike the Blue situation, these appellants could gain nothing by a preliminary hearing after counsel had been appointed for them. Their rights had already been irretrievably lost. They were the victims of the "invidious discrimination" between those who can afford counsel and those who cannot.

In view of the Constitutional issues set forth herein, appellants request this Court to reconsider the judgment of February 11, 1965, reverse the conviction and remand with orders to dismiss the indictment.

Respectfully submitted,

(S) Samuel K. Abrams
Samuel K. Abrams

(S) Bernard M. Beerman
Bernard M. Beerman

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The Foregoing are counsel for Appellants Shelton and Pannell and were appointed by this Court.

CERTIFICATE OF GOOD FAITH

Counsel for appellants hereby certify that they believe the issues presented by this Petition to be of such vital concern to appellants that there can be no question of bad faith.

(S) Samuel K. Abrams
Samuel K. Abrams

(S) Bernard M. Beerman
Bernard M. Beerman

CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing PETITION FOR REHEARING EN BANC of appellants has been hand delivered to the attorney for appellee: The United States Attorney at the United States Courthouse, Constitution Avenue and John Marshall Place, Washington, D. C., this 26th day of February, 1965.

(S) Bernard M. Beerman
Bernard M. Beerman